

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

WSOU INVESTMENTS, LLC \*  
DBA BRAZOS LICENSING \* February 21, 2023  
AND DEVELOPMENT \*  
\*  
VS. \* CIVIL ACTION NOS.  
\*  
DELL TECHNOLOGIES INC., \* W-20-CV-480/481/486  
DELL INC., EMC CORP \*  
AND VMWARE INC. \*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
JURY TRIAL PROCEEDINGS  
Volume 1 of 3

APPEARANCES:

For the Plaintiff: Jonathan K. Waldrop, Esq.  
Marcus A. Barber, Esq.  
John W. Downing, Esq.  
Darcy L. Jones, Esq.  
Heather S. Kim, Esq.  
ThucMinh Nguyen, Esq.  
Kasowitz Benson Torres, LLP  
333 Twin Dolphin Drive, Suite 200  
Redwood Shores, CA 94065  
  
Hershy Stern, Esq.  
Julianne Laporte, Esq.  
Kasowitz Benson Torres LLP  
1633 Broadway  
New York, NY 10019  
  
Paul G. Williams, Esq.  
Kasowitz Benson Torres LLP  
1349 West Peachtree Street, NW  
Suite 1500  
Atlanta, GA 30309  
  
Gregory Phillip Love, Esq.  
Steckler Wayne Cherry & Love PLLC  
PO Box 948  
Henderson, TX 75653

1 Mark D. Siegmund, Esq.  
2 Melissa Samano Ruiz, Esq.  
3 Steckler Wayne Cherry & Love, PLLC  
4 8416 Old McGregor Road  
5 Waco, TX 76712

6 For the Defendant: Brian Rosenthal, Esq.  
7 Benjamin Hershkowitz, Esq.  
8 Gibson, Dunn & Crutcher LLP  
9 200 Park Ave.  
10 New York, NY 10166

11 Jaysen S. Chung, Esq.  
12 Y. Ernest Hsin, Esq.  
13 Gibson Dunn & Cruthcher LLP  
14 555 Mission Street, Suite 3000  
15 San Francisco, CA 94105

16 Casey J. McCracken, Esq.  
17 Nathaniel R. Scharn, Esq.  
18 Emily M. Whitcher, Esq.  
19 Gibson, Dunn & Crutcher LLP  
20 3161 Michelson Drive  
21 Irvine, CA 92612

22 Veronica Smith Moyer, Esq.  
23 Gibson, Dunn & Crutcher LLP  
24 2001 Ross Avenue, Suite 2100  
25 Dallas, TX 75201

Barry K. Shelton, Esq.  
Winston & Strawn LLP  
2121 N. Pearl Street, Suite 900  
Dallas, TX 75201

Court Reporter: Kristie M. Davis, CRR, RMR  
PO Box 20994  
Waco, Texas 76702-0994  
(254) 340-6114

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09:01 1 (Hearing begins.)

09:01 2 THE BAILIFF: All rise.

09:01 3 THE COURT: Good morning, everyone.

09:01 4 Please be seated.

09:01 5 Happy to hear whatever issues you have to

09:01 6 take up.

09:02 7 Good morning, Mr. Siegmund.

09:02 8 MR. SIEGMUND: Good morning, Your Honor.

09:02 9 Appreciate your time this morning. Mark Siegmund on

09:02 10 behalf of Plaintiff.

09:02 11 There's two issues I believe, Your Honor,

09:02 12 one of them I'm not going to address. I believe the

09:02 13 defendants raised that, I believe, the Court is in

09:02 14 violation of the Seventh Amendment for the '800 patent.

09:02 15 I'll let them address that.

09:02 16 The other issue I wanted to address is

09:02 17 the motion they filed this morning on unaccused

09:02 18 products, supposedly. And these issues have already

09:02 19 been decided by Judge Gilliland. As Mr. Scott probably

09:02 20 is well aware, there is no motion for summary judgment

09:02 21 on the '360 patent. And the motion for summary

09:02 22 judgment only affected the '800 patent in terms of

09:02 23 damages. Which I think we're in agreement we are not

09:02 24 presenting a damages case at this trial.

09:02 25 So defendants are arguing, Your Honor,

09:02 1 because we have to show in order to prove infringement  
09:02 2 that VMware offers for sale software and hardware.  
09:02 3 That's what we have to show. And they're saying that  
09:02 4 hardware has to be out of this case.

09:02 5 And it's a bridge too far, Your Honor.  
09:03 6 Because from the very beginning in ECF No. 1, our  
09:03 7 complaint, we specifically said that we accused VMware  
09:03 8 software on hardware, specifically VxRail and Dell  
09:03 9 PowerEdge. And those are the two products that I  
09:03 10 believe Defendants say are not in this case.

09:03 11 But what I think Your Honor cares about  
09:03 12 is the expert reports. So what I think Your Honor  
09:03 13 cares about is going to be the citations to our expert  
09:03 14 reports. And I have those readily available if you  
09:03 15 would like, Judge.

09:03 16 But suffice it to say, they're in our  
09:03 17 infringement contentions which is an exhibit to  
09:03 18 Dr. McClellan's infringement report. And then  
09:03 19 Mr. Weinstein has also, in his expert report, accused  
09:03 20 these exact same products.

09:03 21 And so we really don't think there's any  
09:03 22 dispute about this. These products are fairly in the  
09:03 23 case. They've been in the case since the very  
09:03 24 beginning in our complaint. All the way through  
09:03 25 infringement contentions and reports.

09:04 1 So I think that's the issue, Judge.

09:04 2 The only other, I think, issue that they  
09:04 3 might try to argue is that VMware Cloud is not in this  
09:04 4 case. But that's a marketing term, Judge. vSphere is  
09:04 5 the accused product. And vSphere is VMware Cloud.

09:04 6 And, Jorge, if you could pull up the  
09:04 7 exhibit, 646. Sorry, 645. Excuse me.

09:04 8 Okay. Page 3.

09:04 9 I'm still seeing the first page.

09:04 10 There we go. Thank you.

09:05 11 And so, Your Honor, this is a VMware  
09:05 12 marketing document. As you can see, it says VMware  
09:05 13 Cloud on Dell is a VMware-managed cloud service  
09:05 14 offering that brings VMware's enterprise-class  
09:05 15 software.

09:05 16 And it specifically says, VMware vSphere  
09:05 17 running on Dell VxRail. So this is in the case. It's  
09:05 18 been in here the whole time.

09:05 19 And unless Your Honor has any questions,  
09:05 20 I'm happy to provide the citations, but for right now I  
09:05 21 think that's all I have.

09:05 22 THE COURT: Yes, sir.

09:05 23 MR. ROSENTHAL: Good morning, Your Honor.

09:05 24 THE COURT: Good morning.

09:05 25 MR. ROSENTHAL: Brian Rosenthal on behalf

09:05 1 of the defendants. It's good to be here. We're  
09:05 2 looking forward to trial.

09:05 3 We do have a couple of issues. The first  
09:05 4 issue I think Mr. Siegmund did correctly identify. And  
09:05 5 he also identified correctly that Judge Gilliland has  
09:05 6 already resolved this issue.

09:05 7 In fact, Judge Gilliland has already  
09:05 8 resolved this issue I think four or five times. This  
09:06 9 case, in the complaint, originally identified some Dell  
09:06 10 hardware. It originally identified VxRail. It  
09:06 11 originally identified PowerEdge. Those are two Dell  
09:06 12 hardware servers.

09:06 13 Then came the preliminary infringement  
09:06 14 contentions. And there was no mention of any Dell  
09:06 15 hardware. During discovery they tried to get discovery  
09:06 16 about the Dell hardware and we had a hearing in front  
09:06 17 of Judge Gilliland. This was in April of 2022, almost  
09:06 18 a year ago.

09:06 19 And Judge Gilliland said, it's not in  
09:06 20 your contentions. You're not getting discovery on  
09:06 21 VxRail and PowerEdge.

09:06 22 Then they tried to amend their  
09:06 23 infringement contentions way late in the case in August  
09:06 24 of 2022. And we moved to exclude those amended -- or  
09:06 25 they moved for leave to amend their contentions. We

09:06 1 had a hearing about that in November.

09:06 2 And again, Judge Gilliland denied the  
09:07 3 request and said it's too late. You can't wait until  
09:07 4 the end of the case to add these to your case. So the  
09:07 5 Dell hardware products are out.

09:07 6 Then we moved for summary judgment of no  
09:07 7 indirect infringement. And we moved to strike  
09:07 8 Dr. McClellan's expert report that referred to some of  
09:07 9 this hardware because that dealt with indirect  
09:07 10 infringement. There's no indirect infringement in this  
09:07 11 case at all. That was dismissed long ago.

09:07 12 And again Judge Gilliland agreed with us  
09:07 13 and excluded those portions of Dr. McClellan's report  
09:07 14 that Mr. Siegmund wants to cite to. Those deal with  
09:07 15 indirect infringement.

09:07 16 They deal with customers' use of Dell  
09:07 17 hardware in their installation sites. That is not at  
09:07 18 issue in this case. And again Judge Gilliland agreed  
09:07 19 with us.

09:07 20 And then as recently as last -- was it  
09:08 21 last Friday? Was it just a few days ago? The time is  
09:08 22 running -- the days are running into each other. But  
09:08 23 literally four days ago we had a hearing about this  
09:08 24 very issue.

09:08 25 Because despite all of that history, WSOU

09:08 1 tried to amend its expert reports to add VxRail and  
09:08 2 PowerEdge and VMware Cloud which just is a service that  
09:08 3 uses those pieces of hardware from Dell. Add them to  
09:08 4 the expert reports. There were supplemental reports  
09:08 5 that we got at midnight the night before, on  
09:08 6 Valentine's Day.

09:08 7 And Judge Gilliland said no. You can't  
09:08 8 add those to this case.

09:08 9 So I don't know -- I have two problems.  
09:08 10 First of all, they should not be allowed to add  
09:08 11 something to this case. And it's all over their  
09:08 12 slides. It's all over their McClellan demonstratives.  
09:08 13 I'm sure this is, you know, what their case is going to  
09:08 14 be about.

09:08 15 But these patents -- the two patents, by  
09:08 16 the way, that this pertains to are just the '360 patent  
09:09 17 and the '800 patent. These patents, they have decided  
09:09 18 to assert only an apparatus claim and only direct  
09:09 19 infringement, no indirect infringement. And they have  
09:09 20 never accused Dell products of meeting any of these  
09:09 21 elements.

09:09 22 So I don't know why we're arguing it  
09:09 23 again. I don't think we should be arguing this every  
09:09 24 day. I think we should move on to the things that are  
09:09 25 at issue in this case, not the things that have been



09:09 1 repeatedly excluded from this case.

09:09 2 Thank you, Your Honor.

09:09 3 MR. SIEGMUND: Judge, just to clear it  
09:09 4 up, Mark Siegmund on behalf of the plaintiff.

09:09 5 The '800 patent, Exhibit 4 infringement  
09:09 6 contentions, Pages 2, 3, 4 and 52 explicitly say Dell  
09:09 7 PowerEdge. I mean, plain, end of story. They've been  
09:09 8 in there since the entire time.

09:09 9 Second thing I wanted to address, on the  
09:09 10 indirect infringement was stricken. However, the  
09:09 11 following paragraphs of the '800 patent and  
09:10 12 Dr. McClellan's report are still there. And that's the  
09:10 13 Paragraph 86, 152, 163, 235, 303, 375 and so on.

09:10 14 And, Your Honor, an offer for sale of the  
09:10 15 software and hardware is an issue of fact that we  
09:10 16 intend to prove in hopefully about 20 minutes before  
09:10 17 this jury. That's different than the expert saying  
09:10 18 whether or not he's opining on that.

09:10 19 And we are going to prove it. And we  
09:10 20 should have the chance to do so. And Judge Gilliland  
09:10 21 didn't say anything differently to that. Because the  
09:10 22 products have been here. That's all I have.

09:10 23 (Off-the-record bench conference.)

09:11 24 THE COURT: Mr. Rosenthal, could I...

09:11 25 MR. ROSENTHAL: Yes, Your Honor.

09:11 1 THE COURT: I'm going to maintain what  
09:11 2 Judge Gilliland has done all along. Will you tell me  
09:11 3 exactly on the record what it is you believe is  
09:11 4 excluded so I can make sure the plaintiffs hear it and  
09:11 5 know what is excluded?

09:11 6 MR. ROSENTHAL: Yes, Your Honor. Any  
09:11 7 evidence or argument that pertains to the unaccused  
09:11 8 products Dell VxRail, Dell PowerEdge or VMware Cloud.  
09:11 9 Those are the three buzzwords. Dell hardware is  
09:12 10 another.

09:12 11 THE COURT: You said...

09:12 12 MR. ROSENTHAL: Those --

09:12 13 THE COURT: And the last, you just --

09:12 14 MR. ROSENTHAL: Oh. VMware Cloud? Is  
09:12 15 that the one?

09:12 16 THE COURT: I have VMware Cloud.

09:12 17 MR. ROSENTHAL: So there's three.

09:12 18 There's --

09:12 19 THE COURT: I've got it.

09:12 20 MR. ROSENTHAL: Oh, you got those? I was  
09:12 21 just going to say Dell hardware generally. No Dell  
09:12 22 hardware is at issue.

09:12 23 THE COURT: Okay.

09:12 24 MR. ROSENTHAL: Thank you, Your Honor.

09:12 25 THE COURT: Those are excluded and will

09:12 1 not be included in any slides that the jury sees during  
09:12 2 the opening.

09:12 3 What else do we have?

09:12 4 MR. ROSENTHAL: I do have -- Mr. Shelton  
09:12 5 is going to address the '800 damages issue.

09:12 6 THE COURT: Okay.

09:12 7 MR. ROSENTHAL: And I think a couple of  
09:12 8 housekeeping matters.

09:12 9 THE COURT: Mr. Shelton?

09:12 10 MR. SHELTON: Good morning, Your Honor.  
09:12 11 Barry Shelton for the defendants.

09:12 12 As Your Honor is aware, Judge Gilliland  
09:12 13 granted in part the defendants' Daubert motion on  
09:12 14 Mr. Roy Weinstein, and struck all of his damages  
09:12 15 opinions on the '800 patent. As a result of that  
09:12 16 ruling, Plaintiff is not permitted to put on an '800  
09:13 17 damages case in this trial.

09:13 18 Whereas defendants' damages expert,  
09:13 19 Dr. Becker, will put on damages opinions. And the  
09:13 20 quantum of damages that he'll present to the jury is  
09:13 21 around \$40,000 for the '800 patent.

09:13 22 As Your Honor suggested in the final  
09:13 23 pretrial conference on February 1st -- and this is Page  
09:13 24 58, Line 7 through Page 61, Line 5 -- Your Honor  
09:13 25 suggested that -- one of two options.

09:13 1 One is that the defendants could allow  
09:13 2 the plaintiff to rely on Dr. Becker's damages opinions  
09:13 3 on the '800 patent, and we made that offer. We elected  
09:13 4 to allow them to do that on February 18th.

09:13 5 We learned on Saturday that the plaintiff  
09:13 6 declined that invitation and decided to choose Door  
09:13 7 No. 2, which was Your Honor's suggestion that perhaps  
09:13 8 you could take up damages post trial if there was, in  
09:13 9 fact, a finding by the jury that Claim 16 of the '800  
09:14 10 patent was infringed and not invalid.

09:14 11 The problem with that option, Your Honor,  
09:14 12 is that it would violate the defendants' right under  
09:14 13 the Seventh Amendment to have this jury in this trial  
09:14 14 determine damages. And the defendants have not waived  
09:14 15 and do not waive our Seventh Amendment right. And I  
09:14 16 know the Seventh Amendment is something that Your Honor  
09:14 17 holds near and dear.

09:14 18 THE COURT: Well, I don't think we need  
09:14 19 to take this up now. And what I'm saying by that is,  
09:14 20 because I don't want to say it doesn't matter, but  
09:14 21 until there's a finding for the plaintiff of  
09:14 22 infringement and no invalidity, I haven't done  
09:14 23 anything.

09:14 24 And so I think your objection will be at  
09:14 25 the time I -- if I choose to take Method No. 2. Which,

09:14 1 I mean, right now I'm not -- all I'm doing now is  
09:15 2 allowing the plaintiff to put on an infringement case.  
09:15 3 You all are putting on an invalidity case, I think.  
09:15 4 But there'll be no mention of damages on the '800  
09:15 5 patent.

09:15 6 If I do move forward in the way I  
09:15 7 suggested at that time, y'all need to remind me, but  
09:15 8 before I do it, and maybe I'll even have briefing on it  
09:15 9 to see if that's -- I did that as you -- off the cuff.  
09:15 10 I mean, I just was trying to figure out a way -- I've  
09:15 11 had this issue come up before where I have stricken the  
09:15 12 plaintiff's damages expert. And what do you do going  
09:15 13 forward? That's why I gave those two options.

09:15 14 I'm not sure you're right, I'm not sure  
09:15 15 you're wrong. But I don't think we need to take it up  
09:15 16 now. I don't think we need to take it up until I  
09:15 17 choose to move forward by allowing them to do that. If  
09:15 18 that makes sense.

09:15 19 MR. SHELTON: Yes, Your Honor. However,  
09:15 20 I just want to point out that if Your Honor does not  
09:16 21 submit '800 damages to this jury, it will violate our  
09:16 22 constitutional rights. And it will be too late. That  
09:16 23 bell cannot be unrung.

09:16 24 THE COURT: Oh, I'm sorry. I entirely  
09:16 25 missed what you were saying. That's my fault.

09:16 1 You're saying that if -- even if the jury  
09:16 2 doesn't put on any evidence of damages, because they  
09:16 3 have elected not to go with yours, that I still need to  
09:16 4 submit a damages question to the jury in this trial  
09:16 5 because you believe that the -- this jury ought to  
09:16 6 render a verdict on the damages?

09:16 7 MR. SHELTON: Yes, Your Honor. In  
09:16 8 fact --

09:16 9 THE COURT: I'm -- I was -- I was  
09:16 10 thinking the problem was -- I understand it now. So  
09:16 11 let me hear a response that.

09:16 12 Yes, ma'am. Good morning.

09:16 13 MS. JONES: Good morning, Your Honor.  
09:16 14 Darcy Jones on behalf of Plaintiff.

09:16 15 As Your Honor knows, courts have wide  
09:17 16 discretion to bifurcate trials for -- on liability and  
09:17 17 on damages. There is no violation of a Seventh  
09:17 18 Amendment right.

09:17 19 THE COURT: I think -- and you can help  
09:17 20 me answer this question. I believe that it was the  
09:17 21 practice of Judge Robinson in Delaware for her entire  
09:17 22 career to submit the issue of infringement and  
09:17 23 invalidity and not submit the question of damages.

09:17 24 And then I think she told me -- if this  
09:17 25 is wrong, it's my fault and not hers.

09:17 1 I think she told me that she never had to  
09:17 2 have the second trial, that once there was  
09:17 3 infringement, it was -- if there wasn't infringement,  
09:17 4 there wasn't a second trial. And if there was  
09:17 5 infringement, people worked things out.

09:17 6 And so clearly she believed that you  
09:17 7 could bifurcate and do damages in a second case.

09:17 8 MS. JONES: Yes, Your Honor. You're  
09:17 9 absolutely correct. That is the practice in the  
09:17 10 district -- was the practice in the District of  
09:17 11 Delaware, also the practice by Judge Davis in the  
09:17 12 Eastern District of Texas, also practiced in the  
09:18 13 Northern District of Texas.

09:18 14 Judge Davis has done it in the past, her  
09:18 15 instance in the Intel Corp versus CSIRO case in 2008 --

09:18 16 THE COURT: Well, again, even now  
09:18 17 understanding this, I think this is an issue I can take  
09:18 18 up at the jury charge and decide whether or not to  
09:18 19 submit something.

09:18 20 So -- but at least -- yes, sir.

09:18 21 Mr. Shelton?

09:18 22 MR. SHELTON: May I respond, Your Honor?

09:18 23 THE COURT: Unless -- I don't know that  
09:18 24 you need to now. Is there something we need to take up  
09:18 25 now?

09:18 1 MR. SHELTON: I just wanted to point out  
09:18 2 with this discussion of bifurcation that it just pushes  
09:18 3 the problem, that they have no evidence to put on of  
09:18 4 the '800 damages, to potentially a different jury or  
09:18 5 the same jury, which is I believe what Judge Robinson  
09:18 6 would have done.

09:18 7 THE COURT: And that may be the result as  
09:18 8 well. I mean, now the problem we have, as you're  
09:18 9 aware, is that under the law a party that proves  
09:18 10 infringement is entitled to a reasonable royalty.  
09:18 11 That's what the statute says.

09:18 12 And so that's -- this isn't --  
09:19 13 unfortunately for all of us, this isn't a diversity  
09:19 14 case on a breach of an insurance contract, where if  
09:19 15 they don't have damages evidence, they don't have  
09:19 16 damages evidence.

09:19 17 The problem I'm having here is trying to  
09:19 18 be faithful to the statute that the plaintiff's  
09:19 19 entitled to damages and what to do given the situation  
09:19 20 we find ourselves in.

09:19 21 But you've made your record that you gave  
09:19 22 them an opportunity to put on a damage case by using  
09:19 23 your damage expert. And if they choose not to, then  
09:19 24 I'll have to figure out before I charge the jury  
09:19 25 whether or not by doing that they've waived their right



09:19 1 to have a second trial.

09:19 2 Because -- and your argument is, there  
09:19 3 would be no evidence in the second trial. I get that.  
09:19 4 And I'll have to decide whether or not what could be  
09:20 5 deemed -- I'm not saying it is, but it could be deemed  
09:20 6 a waiver might compel me to find that there would be no  
09:20 7 question asked in this case and there would be no  
09:20 8 second trial.

09:20 9 MR. SHELTON: Your Honor, I have taken  
09:20 10 the liberty of providing a case that I would like to  
09:20 11 look at. It's Federal Circuit, Lindemann  
09:20 12 Maschinenfabrik v. American Hoist. It's 895 F.2d  
09:20 13 1403. And the pages --

09:20 14 THE COURT: Say that again, 895 --

09:20 15 MR. SHELTON: It's 895 F.2d 1403. And  
09:20 16 the page that's relevant is 1407. I have a copy to  
09:20 17 hand to Your Honor.

09:20 18 THE COURT: Okay.

09:20 19 MR. SHELTON: And this case, Your Honor,  
09:20 20 deals with the issue that you just identified. Namely,  
09:20 21 the tension in the statute Section 284 that says that  
09:20 22 when damages are available due to infringement, it  
09:21 23 shall be no less than a reasonable royalty.

09:21 24 And this case on PDF Page 5, Your Honor,  
09:21 25 and I've highlighted for Your Honor and the party --

09:21 1 the parties, I think this nails it.

09:21 2 It says: "As above indicated, the  
09:21 3 statute obviates the need to show the fact of damage  
09:21 4 when infringement is admitted or proven, but that does  
09:21 5 not mean that a patentee who puts on literal or no  
09:21 6 evidence -- satisfactory evidence of a reasonable  
09:21 7 royalty can successfully appeal on the ground that the  
09:21 8 amount awarded by the Court is not 'reasonable' and  
09:21 9 therefore contravene Section 284."

09:21 10 And in this same case, Your Honor, there  
09:21 11 is a cite to a Supreme Court case that says that as  
09:21 12 between statutory provisions like Section 284 and the  
09:21 13 Constitution, obviously, our Seventh Amendment right  
09:21 14 controls and trumps the statute.

09:21 15 So I think if Your Honor looks at Page 5  
09:22 16 in that case, it will demonstrate that -- that this  
09:22 17 jury must take up '800 damages to preserve the  
09:22 18 defendants' Seventh Amendment rights.

09:22 19 And, Your Honor, there's two other  
09:22 20 matters briefly that I want to address.

09:22 21 The first is a trial sequencing issue.  
09:22 22 And I know it's the Court's practice to generally not  
09:22 23 take up and hear argument on Rule 50(a) motions that  
09:22 24 are made during trials.

09:22 25 However, I think as has already been

09:22 1 previewed for you by Mr. Rosenthal, you're going to see  
09:22 2 that there are very significant proof problems in the  
09:22 3 plaintiff's infringement case and that the defendants  
09:22 4 will file a Rule 50(a) motion shortly after the close  
09:22 5 of Plaintiff's case and urge you to hear argument on  
09:22 6 it. And I think that you will find that Your Honor  
09:22 7 should take this case away from the jury.

09:22 8               Depending on the evidence that comes in  
09:22 9 in Plaintiff's case-in-chief, Defendants may not put on  
09:23 10 an invalidity case. That would dramatically shorten  
09:23 11 the trial and, as Your Honor knows, will obviate the  
09:23 12 need or the right for Plaintiff to put on a rebuttal  
09:23 13 case.

09:23 14               And then, lastly, Your Honor, as you  
09:23 15 know, Judge Gilliland took up some 14 motions, I  
09:23 16 believe, in his motion hearings on January 27 and  
09:23 17 January 30 and issued two reports and recommendations  
09:23 18 in each of the cases.

09:23 19               And the parties then filed numerous  
09:23 20 objections to those reports and recommendations. And I  
09:23 21 think, as a housekeeping matter, Your Honor should rule  
09:23 22 on those objections before the jury comes in so that  
09:23 23 those rulings are the law of the case.

09:23 24               And I can read in the docket numbers in  
09:23 25 the three cases of the R&Rs and of the objections if

09:23 1 that would assist Your Honor.

09:23 2 THE COURT: Hold on one second.

09:24 3 (Off-the-record bench conference.)

09:24 4 THE COURT: I think there was an issue  
09:24 5 last week, late last week, about the ripeness of them  
09:24 6 being available for me to rule on, but I think that's  
09:24 7 been overcome by the passage of time.

09:24 8 And I'm going to overrule all the  
09:24 9 objections that were made to Judge Gilliland's reports  
09:24 10 and recommendations.

09:24 11 MR. SHELTON: Okay. Thank you, Your  
09:24 12 Honor.

09:24 13 And just one more thing that I should  
09:24 14 have mentioned, Your Honor, with respect to the '800  
09:24 15 damages issue.

09:24 16 If Your Honor is inclined to submit the  
09:24 17 issue of damages not to this jury, which of course I  
09:24 18 strenuously argue that you must under the Constitution,  
09:24 19 there should be, of course, no opportunity for this  
09:24 20 plaintiff who has made all of its strategic and  
09:25 21 tactical decisions throughout this case resulting in  
09:25 22 its damages expert being struck, they should have no  
09:25 23 opportunity to put in new opinions, new evidence --

09:25 24 THE COURT: I think we can take that up.

09:25 25 MR. SHELTON: Thank you, Your Honor.

09:25 1 MR. SIEGMUND: Good morning, Your Honor.  
09:25 2 Mark Siegmund on behalf of the plaintiff.

09:25 3 Quick point of clarification, because it  
09:25 4 might obviate a lot of this, is: We understand your  
09:25 5 ruling that you're excluding any mention of hardware or  
09:25 6 software as it pertains to factual evidence. And we  
09:25 7 believe that was an expansion of Judge Gilliland's  
09:25 8 ruling because we thought that he said this only  
09:25 9 applied to expert opinions.

09:25 10 So I just wanted to clarify that issue.  
09:25 11 Because if your ruling does apply to no mention of  
09:25 12 hardware along with the sale of software in terms of  
09:25 13 factual evidence, then we're going to have to move for  
09:25 14 continuance on the '360 and the '800 patents.

09:25 15 THE COURT: I'm not sure exactly what  
09:25 16 you're saying. I mean --

09:26 17 MR. SIEGMUND: So I guess what I'm  
09:26 18 saying, Your Honor, is --

09:26 19 THE COURT: Well, I've made my ruling.  
09:26 20 In four minutes you all are going to be doing your  
09:26 21 opening arguments.

09:26 22 Is there anything else we need to take  
09:26 23 up?

09:26 24 MR. SIEGMUND: Just for the record, Your  
09:26 25 Honor, we just have to move for a continuance on the

09:26 1 '360.

09:26 2 THE COURT: And that's been respectfully  
09:26 3 overruled.

09:26 4 MR. SIEGMUND: Got it. Thank you, Your  
09:26 5 Honor.

09:26 6 MR. ROSENTHAL: I have something that's  
09:26 7 actually for the openings. There are four slides.

09:26 8 THE COURT: Just hand them to me and I'll  
09:26 9 look at them.

09:26 10 MR. ROSENTHAL: I have them right here.

09:26 11 Rather than me playing telephone,  
09:26 12 Mr. Scharn knows all the details. He'll identify which  
09:27 13 slides we have a problem with. It just has to do with  
09:27 14 some incorrect facts and a verdict form that hasn't  
09:27 15 been agreed.

09:27 16 MR. SCHARN: Good morning, Your Honor.  
09:27 17 I'll try to be brief here since I know the jury is  
09:27 18 waiting on us.

09:27 19 So the first issue is we have -- we've  
09:27 20 reached some agreement on some of our objections that  
09:27 21 we provided last night as to Plaintiff's opening  
09:27 22 demonstrative, but we haven't seen a revised  
09:27 23 demonstrative yet where we can check that those  
09:27 24 agreements have been satisfied.

09:27 25 So we'd ask that we get a revised

09:27 1 demonstrative before things start up here.

09:27 2 THE COURT: Can Plaintiff's counsel  
09:27 3 provide them with the updated?

09:27 4 MR. SCHARN: So then, as Mr. Rosenthal  
09:27 5 mentioned, there are two slides that appear to have the  
09:27 6 verdict form. The problem is that that is not the  
09:27 7 actual verdict form. So there's a risk of confusion  
09:27 8 for the jury there.

09:28 9 We suggested that they just put text  
09:28 10 instead of the actual -- what appears to be the jury  
09:28 11 verdict form. And it doesn't seem like they were  
09:28 12 taking our suggestion. We don't know yet because we  
09:28 13 haven't seen the revised slides.

09:28 14 THE COURT: Let me hear from the  
09:28 15 plaintiff. I don't believe I've had anyone discuss the  
09:28 16 verdict form during opening argument.

09:28 17 MR. WALDROP: Good morning, Your Honor.

09:28 18 THE COURT: Yes, sir.

09:28 19 MR. WALDROP: Your Honor, we don't call  
09:28 20 it the verdict form. We say that the jury's going to  
09:28 21 be asked two questions. We do not refer it to as a  
09:28 22 verdict form in any way. It's not labeled a verdict  
09:28 23 form. But those are the questions that they will be  
09:28 24 asked.

09:28 25 And, Your Honor, we're happy to take the

09:28 1 slides down, Your Honor. But I think you're going to  
09:28 2 instruct them that they're going to ask these two  
09:28 3 questions so --

09:28 4 THE COURT: I would take the slides down  
09:29 5 at this point. I think it's much -- I think it's  
09:29 6 asking a little much during the opening argument for  
09:29 7 them to see that. And you'll get to use those during  
09:29 8 closing.

09:29 9 MR. WALDROP: Thank you, Your Honor. I  
09:29 10 appreciate Your Honor. Thank you.

09:29 11 THE COURT: Yes, sir?

09:29 12 MR. SCHARN: So the next issue is Slide  
09:29 13 35 of Plaintiff's opening presentation. Maybe it's 36.  
09:29 14 Sorry about that.

09:29 15 So the problem with this one is  
09:29 16 Plaintiffs filed two motions in limine stating that  
09:29 17 Defendants cannot compare the specification to the  
09:29 18 accused product. But that's exactly what Plaintiff has  
09:29 19 done here.

09:29 20 They were successful in those two  
09:29 21 motions. Your Honor granted those. So, you know, it's  
09:29 22 kind of a sauce for the goose/gander situation.

09:29 23 THE COURT: A response?

09:29 24 MR. WALDROP: Your Honor, we accommodated  
09:29 25 them by removing the title slide. And this is the



09:29 1 patent on the left side and the figure on the face of  
09:30 2 the patent, Your Honor. And on the right side is what  
09:30 3 they call VeloCloud from their documents, Your Honor.

09:30 4 Your Honor, we're not going to say that  
09:30 5 we're saying that the figure infringes the patent.  
09:30 6 But, Your Honor, but we're showing the jury what on the  
09:30 7 left is the '133 patent, which apparently is the only  
09:30 8 patent remaining in the case, Your Honor, and  
09:30 9 VeloCloud, the product that they said we believe is  
09:30 10 covered by it.

09:30 11 We're not going to say this. The title  
09:30 12 will be removed but we think this is fair game, Your  
09:30 13 Honor.

09:30 14 THE COURT: Counsel? I'm a goose for the  
09:30 15 gander if -- if counsel for Plaintiff wants to do this,  
09:30 16 then I'm probably going to be pretty liberal in what I  
09:30 17 allow the defendant to do in a similar -- I don't care.  
09:30 18 I just want it to be fair.

09:30 19 If you'd like to use this, and I  
09:30 20 understand why you would, it doesn't offend me. But I  
09:30 21 would probably be pretty generous in what I allow the  
09:30 22 defendants to do with the figures as well.

09:30 23 MR. WALDROP: Thank you, Your Honor.

09:31 24 THE COURT: Okay. So I'll overrule that  
09:31 25 objection.

09:31 1 Counsel?

09:31 2 MR. SCHARN: Very well, Your Honor.

09:31 3 For the sake of time, the -- there are  
09:31 4 only two more. These are document objections with  
09:31 5 Dr. McClellan. And the first one is with respect to  
09:31 6 PTX --

09:31 7 (Off-the-record discussion.)

09:31 8 MR. ROSENTHAL: I'm so sorry, Mr. Scharn.  
09:31 9 This will happen in the afternoon. Can we do that at  
09:31 10 lunch so the jury can come in?

09:31 11 THE COURT: Of course.

09:31 12 MR. ROSENTHAL: Is that all right?

09:31 13 Thanks.

09:31 14 THE COURT: Is there anything else we  
09:31 15 need to take up?

09:31 16 MR. SIEGMUND: Not from the plaintiff,  
09:31 17 Your Honor.

09:31 18 THE COURT: Okay. We'll --

09:31 19 MR. ROSENTHAL: Not from us, Your Honor.

09:31 20 THE COURT: Mr. Rosenthal, will y'all be  
09:31 21 doing your openings this morning?

09:31 22 MR. ROSENTHAL: Oh, yes.

23 THE COURT: Okay.

09:31 24 MR. ROSENTHAL: Thank you.

09:31 25 THE COURT: In about two minutes we'll

09:31 1 bring the jury in.

09:31 2 THE BAILIFF: All rise.

09:31 3 (Recess taken.)

09:35 4 THE BAILIFF: All rise.

09:35 5 THE COURT: Please remain standing for  
09:35 6 the jury.

09:35 7 (Jury entered the courtroom.)

09:36 8 THE COURT: Thank you. You may be  
09:36 9 seated.

09:36 10 Ladies and gentlemen of the jury, let me  
09:36 11 introduce myself to you. My name is Alan Albright.  
09:36 12 I'm the United States district judge for the Waco  
09:36 13 Division of the Western District of Texas.

09:36 14 COVID must officially be over. You are  
09:36 15 the first jury in three years that's sat next to each  
09:36 16 other. And so it's -- I think it's a good thing for  
09:36 17 our nation that we're back, and that we appreciate all  
09:36 18 of you being here.

09:36 19 There's one housekeeping matter I'm going  
09:36 20 to take up before I ask these fine gentlemen to give  
09:37 21 you their opening arguments. Unfortunately, and this  
09:37 22 has no impact on you, but a very close friend of mine  
09:37 23 passed away in his sleep over the weekend and his  
09:37 24 funeral is on Friday. So we will not be having trial  
09:37 25 on Friday.

09:37 1 I know that interferes with the lawyers'  
09:37 2 schedule. And I'm sorry for them. And I know it  
09:37 3 interferes with your schedule and being able to get the  
09:37 4 case done. But I'll be in another city on Friday. And  
09:37 5 I apologize for not being here for that. But I just  
09:37 6 wanted you to know why we're not going Friday.

09:37 7 So you're about to hear the opening  
09:37 8 arguments by counsel. It's important for you to  
09:37 9 understand that these are not evidence. What they're  
09:37 10 going to do is try to provide you with a blueprint of  
09:37 11 what they anticipate the evidence will show.

09:37 12 You are blessed to have some of the  
09:37 13 finest lawyers in our country arguing on both sides of  
09:38 14 this case. I'm very much looking forward to the trial.  
09:38 15 But the opening arguments are just arguments.

09:38 16 When the plaintiff calls their first  
09:38 17 witness, that's when the evidence will begin.

09:38 18 So that being said, Counsel, would you  
09:38 19 like to give the opening argument in the case?  
09:38 20 Mr. Waldrop?

09:38 21 MR. WALDROP: Yes, Your Honor. Thank  
09:38 22 you, Your Honor.

09:38 23 THE COURT: And would you like any  
09:38 24 warning before your time is up?

09:38 25 MR. WALDROP: Yes, Your Honor. Five

09:38 1 minutes, Your Honor.

09:38 2 THE COURT: You'll have it.

09:38 3 MR. WALDROP: I hope to be -- never hear  
09:38 4 that.

09:38 5 (Laughter.)

09:38 6 THE COURT: Okay.

09:39 7 MR. WALDROP: There we are. There we  
09:39 8 are.

09:39 9 May it please the Court. Good morning,  
09:40 10 ladies and gentlemen of the jury. My name is Jonathan  
09:40 11 Waldrop and I represent Brazos, a company based right  
09:40 12 here in Waco, Texas, and this trial against VMware, one  
09:40 13 of the largest computer networking companies in the  
09:40 14 world, based in California.

09:40 15 Yesterday was my birthday. And thank  
09:40 16 you. And I have to say that it is a great honor and  
09:40 17 blessing to be with you here today. And of course with  
09:40 18 Judge Albright.

09:40 19 With me at counsel table are the lawyers  
09:40 20 on the Brazos team who will be trying this case with  
09:40 21 me. They include Darcy Jones, Greg Love. And also at  
09:40 22 counsel table is Craig Etchegoyen, the founder and  
09:40 23 chairman of Brazos, my client.

09:40 24 Now, sitting behind counsel table are  
09:40 25 other lawyers on the Brazos team who will be

09:40 1 participating in this trial. They include Mark  
09:41 2 Siegmund and Heather Kim. This is their first trial  
09:41 3 and they'll be taking witnesses in their first trial  
09:41 4 and I'm very proud of them. Hershy Stern, Minh Nguyen,  
09:41 5 Paul Williams and Julianne Laporte.

09:41 6 Now, ladies and gentlemen, the stars of  
09:41 7 this case are U.S. Patent Nos. 7,539,133, 9,164,800,  
09:41 8 7,092,360. Brazos owns these patents and these patents  
09:41 9 are Brazos' property. During the trial I'll call all  
09:41 10 three Brazos' property, Brazos' patents.

09:41 11 Each patent covers valuable and important  
09:41 12 inventions that improve congestion on computer  
09:41 13 networks. VMware uses Brazos' patents without  
09:41 14 permission and without paying Brazos.

09:41 15 In the pandemic almost everyone has used  
09:41 16 some kind of video conference software -- software  
09:42 17 application or streaming service like FaceTime or  
09:42 18 YouTube. Could you even imagine going through that  
09:42 19 challenging time without these technologies?

09:42 20 And everybody has had the experience when  
09:42 21 the video is spotty or the sound is out or it's blurry  
09:42 22 or it's slow or the sound goes out. Now, Brazos'  
09:42 23 patents solve these problems and allow you to stream  
09:42 24 these videos without interruption.

09:42 25 You'll note an example from last Thursday

09:42 1 when Judge Gilliland gave about the traffic light.  
09:42 2 Well, the flow of information on the Internet is a lot  
09:42 3 like the flow of the traffic on the highway. And the  
09:42 4 information that flows on the Internet flows in the  
09:42 5 form of data packets.

09:42 6 And just like the highway can be  
09:42 7 overloaded with traffic from cars, the Internet can be  
09:42 8 overloaded from traffic from these data packets. And  
09:42 9 just like congestion on the highway, a network can be  
09:42 10 congested. And we all know that congestion is bad.

09:43 11 Now, from the end-user perspective, on  
09:43 12 the highway network congestion feels like a network  
09:43 13 slow down, feels like things are moving slowly. And  
09:43 14 that happens when the network is overflowed and can't  
09:43 15 handle the data traffic that's on the network.

09:43 16 Because of our client's technologies  
09:43 17 which reduce network congestion, you can sit at your  
09:43 18 home or your mobile computer or your mobile device and  
09:43 19 stream services by connecting to the network over the  
09:43 20 Internet and use services like FaceTime or YouTube or  
09:43 21 e-mail and enjoy that service reliably and quickly.

09:43 22 You know what it's like, and we all do,  
09:43 23 to be on the highway and there's construction. And  
09:43 24 there's stop-and-go traffic on the highway. Where our  
09:43 25 technologies, our client's technologies, it's like

09:43 1 driving on the express lane all day, every day. These  
09:44 2 are amazing technologies that many of us, most of us,  
09:44 3 have grown accustomed to but 20 years ago were unheard  
09:44 4 of.

09:44 5 You see, ladies and gentlemen, the Brazos  
09:44 6 patents in this case were invented by Alcatel-Lucent.  
09:44 7 Now, Alcatel-Lucent was formed by a combination of AT&T  
09:44 8 Technologies and Bell Labs, among others.

09:44 9 Now, ladies and gentlemen, Bell Labs is  
09:44 10 one of the most innovative companies in U.S. history.  
09:44 11 Bell Labs is still innovating and making new inventions  
09:44 12 today. The scientists at Bell Labs have received nine  
09:44 13 Nobel Prizes for physics. Nine. With their latest in  
09:44 14 2018.

09:44 15 Now, you may have also -- and this is  
09:44 16 important too. One of the inventors of the '800 patent  
09:44 17 that we're going to discuss in this case works for Bell  
09:44 18 Labs.

09:44 19 Now, you may have also heard of Nokia.  
09:44 20 Nokia introduced the first camera phone and is a leader  
09:45 21 in network technology. Nokia owns tens of thousands of  
09:45 22 patents and has invested billions of dollars in  
09:45 23 developing that technology.

09:45 24 Now, Nokia bought Alcatel-Lucent and all  
09:45 25 of their patents in 2016. And all of their patents in



09:45 1 2016.

09:45 2 Now, in 2017, a year later, when our  
09:45 3 client saw the amazing Brazos patents and the amazing  
09:45 4 technology that they encountered -- that they had, our  
09:45 5 client, Brazos, decided to buy the Brazos patents from  
09:45 6 Nokia. And the Brazos patents became our client's  
09:45 7 property.

09:45 8 And Brazos then decided to license the  
09:45 9 Brazos patents to companies like VMware who were using  
09:45 10 the Brazos patents without permission and without  
09:45 11 paying for them.

09:45 12 And what I mean by license, license is  
09:45 13 permission from the patent owner to use it. It's like  
09:45 14 when you have a lease of a car. You don't own the car  
09:46 15 but you have the right to use the car under certain  
09:46 16 conditions. Like how many miles you can drive, who's  
09:46 17 the main driver, when you have to return the car.  
09:46 18 That's what a license is. It's permission. And our  
09:46 19 client got the rights to grant that permission.

09:46 20 Now, also, our client teamed up with  
09:46 21 Nokia and agreed to give Nokia a portion of the revenue  
09:46 22 that it received from the companies like VMware who had  
09:46 23 agreed to pay for the permission to use those patents.  
09:46 24 That was part of the deal.

09:46 25 In other words, Brazos helps patent

09:46 1 owners get fairly compensated for their inventions,  
09:46 2 which encourages other people to make new and important  
09:46 3 inventions.

09:46 4 Imagine constantly creating new  
09:46 5 inventions only to have corporations like VMware profit  
09:46 6 from them without asking, without paying anyone.

09:46 7 It is crucial for the American economy  
09:47 8 that we foster innovation and invention and that patent  
09:47 9 owners receive fair compensation for the invention.

09:47 10 Now, in fact, Brazos wasn't the only  
09:47 11 company that recognized the value of the patented  
09:47 12 technologies. VMware also saw their potential, and  
09:47 13 they started using Brazos' patents and Brazos'  
09:47 14 technologies in products they called vSphere 6.5 and  
09:47 15 VeloCloud.

09:47 16 Now, the network congestion control  
09:47 17 technologies that our client Brazos paid for and now  
09:47 18 owns, the amazing technologies that our client owns the  
09:47 19 patents for, and I'm going to talk about the patents in  
09:47 20 a minute, VMware uses these technologies for its  
09:47 21 vSphere and VeloCloud products and they call it  
09:47 22 VeloCloud SD 1. And I'll call it VeloCloud for most of  
09:47 23 this case.

09:47 24 VMware use these same technologies  
09:47 25 without permission, without license from Brazos,

09:48 1 without paying Brazos for anything.

09:48 2 Now, taking something of value without  
09:48 3 asking and without paying is stealing. And that's  
09:48 4 precisely what VMware has done in this case.

09:48 5 Like many corporations, VMware has  
09:48 6 decided to take a wait-and-see approach. VMware has  
09:48 7 decided, we'll take our chances. VMware has decided  
09:48 8 that it's worth the risk to use Brazos' patents and not  
09:48 9 pay Brazos.

09:48 10 So ladies and gentlemen, VMware has  
09:48 11 forced my client, forced us to bring them to court  
09:48 12 today to resolve this. That's the reason why we're  
09:48 13 here, ladies and gentlemen. That's the reason why  
09:48 14 we're asking you to resolve this.

09:48 15 VMware just out and took our client's  
09:48 16 network technologies, put them in their products where  
09:48 17 our products are being used by millions of people every  
09:49 18 day, and VMware's making a fortune from our  
09:49 19 technologies and has not paid our client a single dime.

09:49 20 And VMware's been doing this for years.

09:49 21 Now, I come from a long line of ministers  
09:49 22 in Alabama. My great grandfather was a minister. And  
09:49 23 my grandfather said to me, he told me, he said,  
09:49 24 Jonathan, son, you may be small and you may be David  
09:49 25 and they may be and are Goliath, but God gave David a

09:49 1 slingshot.

09:49 2 And Brazos' slingshot is our day in court  
09:49 3 here in Waco to protect our property rights. And  
09:49 4 that's why we're here, ladies and gentlemen.

09:49 5 Now, last Thursday you remember hearing  
09:49 6 from Judge Fogel in the patent video that a patent is a  
09:49 7 property right. A patent is a right to exclude others  
09:50 8 from your property, from making, using or selling your  
09:50 9 patented technology.

09:50 10 So when you get a patent, the U.S. laws  
09:50 11 and even the U.S. Constitution give you the right to  
09:50 12 exclude others.

09:50 13 Brazos has the right to exclude VMware or  
09:50 14 anyone else from making, using or selling the patented  
09:50 15 technology covered by the Brazos' patents. In other  
09:50 16 words, VMware can't use any of Brazos' patents without  
09:50 17 Brazos' permission.

09:50 18 And patent infringement is just like  
09:50 19 trespassing on somebody's property. It is not a  
09:50 20 defense to patent infringement to say, well, they're  
09:50 21 not the owners or they're not making use of it.

09:50 22 Just like somebody can't come on to your  
09:50 23 property without asking you and saying that you, you  
09:50 24 didn't build a house on it, you're not making use of  
09:50 25 it. It's your property. You have the right to defend

09:50 1 it.

09:50 2 And Judge Gilliland told you last  
09:51 3 Thursday, he said that if a patent is granted, it's  
09:51 4 presumed valid. And what that means is no one can use  
09:51 5 the invention without getting the patent owner's  
09:51 6 permission.

09:51 7 And if you do use it without permission,  
09:51 8 you must pay the patent owner. That's fair. But  
09:51 9 VMware has refused.

09:51 10 So now let's take a look at the three  
09:51 11 Brazos patents at issue in this case, what VMware  
09:51 12 stole.

09:51 13 Ladies and gentlemen, the patents are  
09:51 14 very detailed and technical. But don't worry, Brazos  
09:51 15 has a technical expert who's going to come in and walk  
09:51 16 you through each of these patents and what they're  
09:51 17 about. But I'm going to try to summarize for you at a  
09:51 18 high level so you're familiar with them.

09:51 19 The first patent is -- Brazos patent is  
09:51 20 the patent you'll see on the top. It's the 7,539,133  
09:51 21 patent. And for purposes of this trial, I'll call it  
09:51 22 the '133 patent. And then you'll see the title, it  
09:52 23 says: Method and apparatus for preventing congestion  
09:52 24 in load-balancing networks.

09:52 25 You'll also see, ladies and gentlemen,

09:52 1 that the assignee is Alcatel-Lucent USA, Inc. And  
09:52 2 that's there just because Alcatel-Lucent owned it at  
09:52 3 the time. You remember Nokia bought Alcatel-Lucent  
09:52 4 later.

09:52 5 And you'll see right under that that it  
09:52 6 was filed on March 23, 2006. And it issued on May 26,  
09:52 7 2009.

09:52 8 Now, you'll see that from the time the  
09:52 9 '133 patent application was filed and was ultimately  
09:52 10 granted in 2009, it took three years for the experts at  
09:52 11 the USPTO to review the application and ultimately  
09:52 12 issue.

09:52 13 Now, what that means is these experts who  
09:52 14 specialize in patents, they reviewed it for three  
09:52 15 years. And they ultimately decided to grant 22 claims  
09:52 16 in the '133 patent. Each claim is a different  
09:52 17 invention. So there's 22 inventions in the '133 patent  
09:52 18 that are claimed.

09:52 19 Now, ladies and gentlemen, I'm guessing  
09:52 20 you'll breathe a sigh of relief, we're only going to  
09:53 21 deal with one of those 22 inventions in this trial.  
09:53 22 And that's lucky Claim 13.

09:53 23 Lucky Claim 13 is an invention that  
09:53 24 allows for the processing of those data packets I  
09:53 25 talked about on the Internet, on the computer network,

09:53 1 to avoid congestion at the exit points in the network.  
09:53 2 And it also routes traffic based on the priority of the  
09:53 3 information of the data packets.

09:53 4 One way to think about this in your  
09:53 5 everyday life is to -- remember when I talked about how  
09:53 6 this technology relates to network congestion and how  
09:53 7 that is like highway congestion?

09:53 8 Think of a computer traffic cop who  
09:53 9 directs traffic of packets of information to the best  
09:53 10 exits on the road when they're congested, and -- but  
09:53 11 this is a special computer cop -- traffic cop because  
09:53 12 he knows information about the congestions at the exits  
09:53 13 ahead. He sees ahead.

09:53 14 But as we all know, not all traffic is  
09:53 15 created equal, right?

09:53 16 So the traffic cop is able to prioritize  
09:53 17 different kinds of traffic. So he knows the difference  
09:53 18 between the police, the ambulance, the funeral  
09:54 19 procession over regular commuter traffic.

09:54 20 So this traffic cop can prioritize  
09:54 21 traffic to the right exit before regular commuter  
09:54 22 traffic.

09:54 23 Now, Brazos' technical expert is going to  
09:54 24 explain all of this in great technical detail to you,  
09:54 25 but you'll understand it.

09:54 1 Now, let's talk about the second Brazos  
09:54 2 patent and you'll see that this patent on the top  
09:54 3 right-hand corner is the U.S. 9,164,800, and I'll call  
09:54 4 it the '800 patent for purposes of this trial.

09:54 5 This is entitled: Optimizing latencies  
09:54 6 in cloud systems by intelligent compute node placement.  
09:54 7 You'll see the title of it.

09:54 8 You'll also see here the assignee is  
09:54 9 Alcatel-Lucent. They owned it at the time. Remember,  
09:54 10 Nokia bought Alcatel-Lucent, so did the Brazos. Brazos  
09:54 11 owns it now.

09:54 12 Now, you'll see this was filed  
09:54 13 October 25, 2012, and it issued on October 20, 2015.  
09:54 14 We'll call this the '800 patent.

09:55 15 Again, the experts at the USPTO who  
09:55 16 specialize in patents, they reviewed this for three  
09:55 17 years. And they ultimately decided to issue it with 24  
09:55 18 claims. That's 24 different inventions. Again, we're  
09:55 19 only going to talk about one.

09:55 20 We're going to talk about only one  
09:55 21 invention of the '800 patent, and that's Claim 16. And  
09:55 22 it's shown here on the screen.

09:55 23 Now, at the time of the invention of  
09:55 24 Claim 16, businesses and governments stored data,  
09:55 25 right, in those big physical data centers, those large,



09:55 1 tall buildings with racks of servers, right, all in a  
09:55 2 central location.

09:55 3 And the only way that you could get the  
09:55 4 data you wanted was to go to that central location, and  
09:55 5 that was the only way you could get it, that particular  
09:55 6 location.

09:55 7 Now, the invention of Claim 16, however,  
09:55 8 allows virtual machines and servers so that users can  
09:55 9 get the data they need from multiple sources, not just  
09:55 10 stuck to that central location, and that way you avoid  
09:56 11 network congestion. Multiple places to get  
09:56 12 information.

09:56 13 Now, you remember I talked earlier about  
09:56 14 the '133 patent and it was an exit traffic cop, the  
09:56 15 computer traffic cop. One way to think of this is to  
09:56 16 imagine that you're trying to get to a Whataburger, and  
09:56 17 you don't care which one you get to because you want  
09:56 18 that burger. You're hungry. You just want the burger  
09:56 19 and you want to get there the fastest.

09:56 20 Well, this computer traffic cop of the  
09:56 21 '800 patent gets you to the Whataburger that's not  
09:56 22 crowded, that's not congested.

09:56 23 Now, you're going to hear a lot more  
09:56 24 technical details about this from Brazos' technical  
09:56 25 expert, but I want to give you a sense of how these

09:56 1 patents avoid congestion and how that relates to you in  
09:56 2 your everyday life.

09:56 3 Now, the last patent that we're going to  
09:56 4 talk about is the third Brazos patent, which is the  
09:56 5 U.S. 7,092,360 patent. We'll call it the '360 patent  
09:56 6 for purposes of this trial. And the title of it is:  
09:56 7 Monitor, system and method for monitoring performance  
09:56 8 of a scheduler.

09:56 9 Now, you'll see here the assignee is  
09:57 10 labeled Tropic Networks, Inc. Now, Alcatel-Lucent in  
09:57 11 2007 bought Tropic Networks and all of their patents,  
09:57 12 including the '360 patent. But at the time this patent  
09:57 13 issued, it was owned by Tropic Networks. Now, it's  
09:57 14 Brazos' property.

09:57 15 Now, ladies and gentlemen, you see on the  
09:57 16 date that the application was filed in December 28,  
09:57 17 2001, and that it issued on August 15, 2006.

09:57 18 Now, again, after reviewing this patent  
09:57 19 for five years, the experts at the United States Patent  
09:57 20 Office did their work carefully and granted the '360  
09:57 21 patent, which has 49 inventions, 49. And we're only  
09:57 22 going to talk again about only one, and that's Claim 1  
09:57 23 of the '360 patent.

09:57 24 Now, this patent also deals with traffic  
09:57 25 congestion on the Internet. This invention allows for

09:57 1 the monitoring of a computer network to make sure that  
09:57 2 the data packets are being sent at the right time  
09:58 3 without problems.

09:58 4 So one way to think about this in your  
09:58 5 everyday life is imagine that you're in a car that's  
09:58 6 broken down on the highway. However, you don't have  
09:58 7 any idea what's wrong with the car. It's smoking.  
09:58 8 We've all been there.

09:58 9 However, it won't drive no matter what.  
09:58 10 And in this instance, you just got to get the car  
09:58 11 towed.

09:58 12 Well, and we know that takes a lot of  
09:58 13 time and money. But without -- with the invention of  
09:58 14 the Claim 1 of the '360 patent, the driver gets a  
09:58 15 message from your car monitor and it says, hey, your  
09:58 16 oil is low.

09:58 17 And with that information, you can go to  
09:58 18 the nearest Valvoline and get the oil change you need  
09:58 19 instead of waiting there not knowing what's happening  
09:58 20 with your car and getting it towed.

09:58 21 It does that for flow of information on  
09:58 22 the Internet. Now, Brazos' technical expert is going  
09:58 23 to explain all of this to you in more detail.

09:58 24 Now, I'm still -- I'm thinking that you  
09:59 25 may be thinking to yourself, look. What are all these

09:59 1 technical terms? You know, what is a switching node?  
09:59 2 What is a load-balancing network? What's all these  
09:59 3 terms in this patent?

09:59 4 Well, thankfully the Court has already  
09:59 5 defined some of these terms as having the plain and  
09:59 6 ordinary meaning for one of ordinary skill in the art,  
09:59 7 and that just means they've been explained to someone  
09:59 8 to use the meaning of someone who understands the  
09:59 9 invention.

09:59 10 And Brazos' technical expert understands  
09:59 11 the inventions. And he's going to explain them to you  
09:59 12 in a way that you can understand.

09:59 13 Now, in the beginning of my opening I  
09:59 14 talked a little bit about the plaintiff Brazos, my  
09:59 15 client, and how it helps companies license their  
09:59 16 patents that are being used without permission.

09:59 17 Brazos also licenses patents that it  
09:59 18 owns. Brazos owns many, many patents from many  
09:59 19 innovative companies. And what I mean by that is that  
09:59 20 Brazos will give people permission, if they obtain it,  
09:59 21 to use their technology. They want people to use their  
10:00 22 technology, with permission, if they pay for it.

10:00 23 And so people come to Brazos to help them  
10:00 24 get compensated when others are using their patents  
10:00 25 without permission.

10:00 1 Now, Brazos owns thousands of patents,  
10:00 2 like I said before, developed from  
10:00 3 Nokia/Alcatel-Lucent, Bell Labs and other companies and  
10:00 4 other companies. And many, many, many companies have  
10:00 5 taken licenses from Brazos to use Brazos' technology  
10:00 6 which means they can lawfully use Brazos' patents  
10:00 7 because they got permission. So Brazos does that.  
10:00 8 They'll give permission if you do it the right way.

10:00 9 And these companies that have gotten  
10:00 10 permission to use Brazos' patented technologies and  
10:00 11 inventions, they include companies like Microsoft, NEC,  
10:00 12 Huawei, NXP, many, many others that you heard from. So  
10:00 13 meaning of these companies have paid money to Brazos so  
10:00 14 that they can lawfully use the technology owned by  
10:00 15 Brazos. VMware has not.

10:00 16 Now, the first witness that you will hear  
10:01 17 from in this case will be Mr. Craig Etchegoyen. This  
10:01 18 is Brazos' chairman and founder. Mr. Etchegoyen is  
10:01 19 sitting right here, here today in court. You'll hear  
10:01 20 from him in a few minutes.

10:01 21 He's spent most of his life helping  
10:01 22 underdogs protect their patent rights. He's an  
10:01 23 inventor himself of over 100 patents. And he started  
10:01 24 several successful companies. He will testify about  
10:01 25 Brazos and why they're here today defending their

10:01 1 property rights.

10:01 2 Now, let's talk a little bit about the  
10:01 3 defendant VMware and the accused products in this case.  
10:01 4 VMware was founded in 1998. It's a technology company.  
10:01 5 It sells products that have solutions to reduce network  
10:01 6 congestion. Those products include hardware and  
10:01 7 software.

10:01 8 And what I mean by hardware, I mean by  
10:01 9 the physical machine or device. And what I mean by  
10:01 10 software is the instructions that go in the device to  
10:01 11 tell it what to do.

10:01 12 Now, VMware was purchased by a company  
10:02 13 called EMC -- you may have heard of it -- in 2004 and  
10:02 14 was subsequently bought by Dell in September 2016.  
10:02 15 Now, VMware and Dell separated in 2021. And now VMware  
10:02 16 is a standalone company.

10:02 17 Now, ladies and gentlemen, in addition to  
10:02 18 Dell having owned VMware, Dell and VMware had a  
10:02 19 partnership. VMware offers to its customers software  
10:02 20 and hardware included in their pricing. It has been a  
10:02 21 very lucrative and successful partnership.

10:02 22 Now, on this slide we have the products  
10:02 23 that infringe Brazos' patents. We have the VeloCloud  
10:02 24 product and then vSphere 6.5 and later versions,  
10:02 25 different models of products that came after

10:02 1 vSphere 6.5. Throughout the trial I'll call this  
10:02 2 VeloCloud and vSphere 6.5.

10:02 3 Now, in 2017, VMware bought a company  
10:02 4 called VeloCloud which had been selling the VeloCloud  
10:03 5 SD-WAN products. That's the accused -- one of the  
10:03 6 accused products in this case. And VMware has kept  
10:03 7 selling that product today. And they haven't stopped.

10:03 8 Now, VeloCloud and vSphere 6.5 were  
10:03 9 critical to VMware's business. And the evidence will  
10:03 10 show that.

10:03 11 Now, the evidence will also show that  
10:03 12 Brazos' patents are critical to reducing network  
10:03 13 congestion. It will show that people didn't want to  
10:03 14 buy VMware's products without technology that reduced  
10:03 15 network congestion significantly, right, and increase  
10:03 16 performance. And that's what Brazos' patents do.

10:03 17 Now, everyone has heard the saying that a  
10:03 18 picture is worth a thousand words. Now, this is just  
10:03 19 some of the evidence that you will see during the  
10:03 20 trial. Here on the left is a Figure 1 from the '133  
10:03 21 patent and on the right --

10:03 22 THE COURT: Mr. Waldrop, you have five  
10:03 23 minutes.

10:03 24 MR. WALDROP: Okay. And on the right are  
10:04 25 technical documents that describe the VeloCloud SD-WAN

10:04 1 product.

10:04 2           The evidence will show that Claim 1,  
10:04 3 Claim 13 of the '133 patent covers Figure 1. And that  
10:04 4 Claim 13 of the '133 patent covers VeloCloud. Imagine  
10:04 5 if those pictures were put side by side on top of each  
10:04 6 other.

10:04 7           The evidence will show that VMware wanted  
10:04 8 to provide the best networking technology performance  
10:04 9 available. And the Brazos patents enabled much faster  
10:04 10 and better performance.

10:04 11           Now, the evidence will also show that the  
10:04 12 three Brazos patents issued years before VMware started  
10:04 13 selling the infringing products. And that they  
10:04 14 continue to infringe today.

10:04 15           Now, on Slide 39, the first -- the second  
10:04 16 witness you will hear from will be -- from  
10:04 17 Mr. Etchegoyen will be -- after Mr. Etchegoyen will be  
10:04 18 Dr. Stan McClellan. This is the technical expert who's  
10:05 19 going to come in here and explain all of this to you.  
10:05 20 He's a professor of electrical engineering and computer  
10:05 21 engineering at -- right down the road at Texas State  
10:05 22 University.

10:05 23           He's going to come through -- come in and  
10:05 24 walk you through all the technical details of the  
10:05 25 patent in which hopefully you can understand. And he's



10:05 1 going to help you answer one and the first most  
10:05 2 important question which is whether the accused VMware  
10:05 3 products infringe the claims of Brazos' patents.

10:05 4 Now, last Thursday Judge Gilliland told  
10:05 5 you that to prove infringement that we had a burden of  
10:05 6 proof by a preponderance of the evidence. At least  
10:05 7 50 percent, a little bit more than 50 percent. We're  
10:05 8 going to exceed that.

10:05 9 But that's our burden. Just a little bit  
10:05 10 over 50 percent. And we're going to show you how  
10:05 11 VMware infringes the accused -- how VMware's accused  
10:05 12 products infringe Brazos' patents. And VMware owes  
10:05 13 Brazos for that infringement.

10:05 14 Now, you heard some of what VMware's  
10:05 15 going to say. And they said it last Thursday. They  
10:06 16 said this is old technology, right? Well, ladies and  
10:06 17 gentlemen, the '133 patent doesn't expire until 2027 --  
10:06 18 2024. The '800 patent expires in 2033. And the '360  
10:06 19 patent expires in 2024.

10:06 20 So as you can see, ladies and gentlemen  
10:06 21 of the jury, we have the right to exclude everyone  
10:06 22 until these patents expire. It doesn't sound like old  
10:06 23 technology to me. These patents are existing today.  
10:06 24 And we have almost, in one case, another decade to  
10:06 25 exclude others.

10:06 1 So we have until 2027 to exclude anyone  
10:06 2 from using the '133 patent. We have until 2033 to  
10:06 3 exclude anyone from the '800. And we have until next  
10:06 4 year to exclude people from using the '360. That's not  
10:06 5 old technology.

10:06 6 You also will hear -- you also will hear  
10:06 7 VMware's counsel say they're here to clear their name,  
10:07 8 that they've been falsely accused. Well, the evidence  
10:07 9 will show that none of that's true. The evidence will  
10:07 10 show even though -- the evidence will show that we're  
10:07 11 here for our day in court.

10:07 12 And I'm sure by the time they're done,  
10:07 13 they'll want you to believe that they're the victim in  
10:07 14 this case. But this is our property.

10:07 15 They'll also ask you to ignore their  
10:07 16 admissions, ignore their documents, ignore the same  
10:07 17 words in the claims and in their products. We sell  
10:07 18 software not hardware. They'll say the patent -- we  
10:07 19 infringe maybe, but maybe the patents are invalid.

10:07 20 But all of that's not true.

10:07 21 You may also hear about a \$2.5 million  
10:07 22 offer to Dell. Not VMware, but to Dell. But that  
10:07 23 offer was made without all the information that we know  
10:07 24 today.

10:07 25 But the real thing is all this is

10:07 1 distractions. The stars of this case are the Brazos  
10:07 2 patents.

10:07 3 Now, the last question that you're going  
10:07 4 to be asked, and it's an important one, is how much is  
10:07 5 Brazos entitled to for damages in this case?

10:08 6 Brazos' economist, Roy Weinstein, will  
10:08 7 walk you through the calculations that he made to  
10:08 8 arrive at a number for damages in this case. And  
10:08 9 hopefully he will do it in a way that you understand  
10:08 10 and can relate to. And he will help you answer that  
10:08 11 question.

10:08 12 But the question is bounded by what you  
10:08 13 heard from Judge Gilliland before and what you will be  
10:08 14 instructed. The patent owner is entitled to no less  
10:08 15 than a reasonable royalty. No less than a reasonable  
10:08 16 royalty. That's what we're entitled to. And  
10:08 17 Mr. Weinstein will help you understand how he arrived  
10:08 18 at that. Because we seek full compensation, not  
10:08 19 partial, for VMware's infringement.

10:08 20 And those total damages here are for the  
10:08 21 '360 patent and the '133 patent are \$81,590,685.

10:08 22 Now, this is important because you don't  
10:08 23 see the '800 patent there, right? Because that's going  
10:08 24 to be handled in a separate proceeding. We're only  
10:08 25 going to deal with infringement for the '800 patent

10:09 1 here in this trial.

10:09 2 So we'll talk about infringement for all  
10:09 3 three patents, but you don't have to deal with the  
10:09 4 damages for the '800 patent. The Court's going to deal  
10:09 5 with that later. But as to these two patents, this is  
10:09 6 the damage that we're seeking.

10:09 7 Now, ladies and gentlemen of the jury,  
10:09 8 I'm going to come back at the close of evidence in this  
10:09 9 case and talk to you about how we met our burden of  
10:09 10 showing infringement and damages. And I'm going to  
10:09 11 talk to you about how you should award us and make the  
10:09 12 findings that we ask for.

10:09 13 Now, this is a great honor to be here.  
10:09 14 It is a great blessing to be in front of you. You are  
10:09 15 providing the highest service to this country that you  
10:09 16 can provide. And as Judge Albright said, it is a true  
10:09 17 honor and a blessing to be with you. And I thank you  
10:09 18 very much for your time. And I'll see you soon. Thank  
10:09 19 you very much.

10:10 20 THE COURT: Would you care for any  
10:10 21 warning?

10:10 22 MR. ROSENTHAL: I'd love a five-minute  
10:10 23 warning, Your Honor. Thank you very much.

10:10 24 And I'm sure I'll hear it.

10:10 25 Okay. Are you all seeing the

10:10 1 presentation? Let me just wait till that comes up.

10:10 2 All right. Thank you.

10:10 3 Well, let me just put this microphone up  
10:10 4 here for the court reporter. Otherwise I'm going to  
10:10 5 get in trouble.

10:10 6 Okay. Good morning. My name is Brian  
10:10 7 Rosenthal. I'm very, very proud to be here today on  
10:10 8 behalf of my clients, the defendants VMware and Dell  
10:10 9 and EMC, and talk to you all today.

10:10 10 The first thing I want to say, and this  
10:11 11 is the point that I'm going to make over and over and  
10:11 12 over again in this trial, and it's what all the  
10:11 13 evidence is going to show, is that VMware just does not  
10:11 14 use these patents. Just doesn't use this technology.

10:11 15 These patents, I understand they're still  
10:11 16 alive, but they were filed a long time ago. And that's  
10:11 17 okay. But it's old technology. It's old technology  
10:11 18 from a cellular technology company. It has no  
10:11 19 applicability to VMware, which is a software company  
10:11 20 making software products to help companies talk to each  
10:11 21 other.

10:11 22 It's not related to what Nokia was  
10:11 23 working on, what Alcatel-Lucent was working on. And  
10:11 24 the technology is outdated. It doesn't have any  
10:11 25 applicability.

10:11 1 And what this case is about is the  
10:11 2 plaintiff wants us to pay \$80 million for technology  
10:11 3 that we don't use. And that's not fair. That's not  
10:11 4 right.

10:11 5 And we'll explain. I don't want you to  
10:12 6 take my word for it. I don't want you to take  
10:12 7 Mr. Waldrop's word for what he's saying either. We're  
10:12 8 lawyers. We're making arguments. But I want you to  
10:12 9 judge, and the jury -- the judge is going to instruct  
10:12 10 you to judge the facts based on the evidence that you  
10:12 11 hear. That's not what I'm saying.

10:12 12 But the first thing I want to do is I  
10:12 13 want to thank you. You heard Judge Gilliland say it  
10:12 14 last week and I couldn't agree more. This really is  
10:12 15 one of the most important things about this country.  
10:12 16 It's one of the founding principles of this country,  
10:12 17 that juries decide civil disputes. And it's a great  
10:12 18 thing.

10:12 19 And you might be asking yourselves, why  
10:12 20 are we deciding this issue about technology and patents  
10:12 21 and all of this networking stuff? We don't have  
10:12 22 training in that area.

10:12 23 And the reason is that this patent --  
10:12 24 this patent case is not just about technology and it's  
10:12 25 not just about the law. It's about what's right and

10:12 1 what's wrong. Who's credible and who's not credible?  
10:13 2 Who's telling the truth? Who's being consistent?

10:13 3 And the jury system allows you all to  
10:13 4 bring your unique experience, your knowledge, your  
10:13 5 moral compass and, most importantly, your common sense  
10:13 6 to the evidence that's being shown.

10:13 7 We're going to have witnesses up on the  
10:13 8 stand. And there's nobody in a better position than  
10:13 9 you to assess whether those witnesses sound credible.  
10:13 10 Are they changing their story from when they testified  
10:13 11 earlier in the case? That's a pretty good indication  
10:13 12 that something's awry, right?

10:13 13 That's stuff that you are very, very  
10:13 14 perfectly situated to judge. And that's all I ask of  
10:13 15 you in this trial, is listen to all the evidence and  
10:13 16 judge what you think is right based on that evidence.

10:13 17 So we thank you. We -- our clients thank  
10:13 18 you. I'm sure both -- all parties thank you. It's a  
10:13 19 very, very important part of what we do.

10:13 20 I want to take a moment and introduce my  
10:14 21 team and my client. Sitting here at counsel table is  
10:14 22 Brooks Beard who's the vice president, a vice  
10:14 23 president, at VMware who has responsibility for this  
10:14 24 litigation for VMware.

10:14 25 Also Anthony Peterman who has -- also a

10:14 1 vice president at Dell and EMC who has responsibility  
10:14 2 for this case.

10:14 3 I am not a one-man show. I have a big  
10:14 4 team, as does Plaintiff's counsel. You're going to be  
10:14 5 hearing -- you already know Ms. Moye from Thursday.  
10:14 6 You'll be hearing from her, from Barry Shelton who's  
10:14 7 based here in Texas. You're going to hear from  
10:14 8 Mr. Hsin, from Mr. Hershkowitz, from Mr. Chung. And  
10:14 9 you may hear from others as well.

10:14 10 But I do want to introduce the most  
10:14 11 important person in the room, which is Mr. Eaton.  
10:14 12 Mr. Eaton runs the show. He puts the slides on the  
10:14 13 screen. He makes sure that we all look very good. If  
10:14 14 he doesn't do his job, we don't look good. I've been  
10:14 15 working with him for 20 years and he's the best.

10:14 16 So we are all very proud to be here  
10:15 17 representing VMware.

10:15 18 Now, I want to introduce who VMware is.  
10:15 19 And I am -- we are -- very proud to be representing a  
10:15 20 company that is this innovative.

10:15 21 In fact, VMware is probably the most  
10:15 22 innovative and successful company that you've never  
10:15 23 heard of. They're not like Google or Microsoft or  
10:15 24 Apple, who we all know because we use their stuff all  
10:15 25 the time.



10:15 1 VMware makes software for those companies  
10:15 2 to use. VMware makes software for companies to use to  
10:15 3 bring their people together. That's what VMware does.  
10:15 4 And they're incredibly innovative.

10:15 5 I'll give you an example. MD Anderson,  
10:15 6 the cancer clinic here in Texas, uses VMware products  
10:15 7 to bring their radiologists, their nurses, everybody  
10:15 8 together to allow them to exchange diagnoses, to  
10:15 9 exchange information, x-rays, et cetera, seamlessly as  
10:15 10 though they're all in the same office, right? That's  
10:15 11 what VMware does. It's an example of the many, many  
10:15 12 customers that we have.

10:15 13 VMware, as Mr. Waldrop said, was founded  
10:16 14 in 1998 by five people in an apartment. And since then  
10:16 15 they have grown to one of the most innovative and  
10:16 16 successful software companies in America. And it  
10:16 17 really is an American innovation story. This is what  
10:16 18 America's all about, is bringing great ideas and  
10:16 19 innovations to the market.

10:16 20 And they have grown in every year,  
10:16 21 introducing new technologies, new products. Today they  
10:16 22 have over 35,000 employees, including 2,000 in Texas.  
10:16 23 They have over 500,000 customers, if you can believe  
10:16 24 that.

10:16 25 In fact, the Fortune 500 list, you know,

10:16 1 the top 500 companies in the world, every single one of  
10:16 2 them uses VMware. Every single one of them. We are a  
10:16 3 very, very well-respected company that brings  
10:16 4 innovative products to the market.

10:16 5 And this is probably my most important  
10:16 6 slide. VMware has done it the right way through hard  
10:17 7 work and innovation. Not through stealing, not through  
10:17 8 taking other people's technology. We have 12,000 of  
10:17 9 our own engineers. 12,000.

10:17 10 We spend a ton every year trying to  
10:17 11 innovate and break new ground in these areas. We have  
10:17 12 been awarded thousands of our own patents. In fact,  
10:17 13 our patent portfolio has been ranked the second most  
10:17 14 powerful patent portfolio in the world of software,  
10:17 15 second only to Microsoft. So we really value our  
10:17 16 culture of innovation.

10:17 17 Now, I do want to say a word about Dell.  
10:17 18 I've been talking about VMware. You might be wondering  
10:17 19 what's the role of Dell in all this? And you heard a  
10:17 20 little bit about this. Dell and its company, EMC,  
10:17 21 owned VMware for a brief period of time. It happens to  
10:17 22 be that when WSOU -- when the plaintiffs sued at that  
10:18 23 time, Dell and EMC were still owners of VMware. That's  
10:18 24 why they're in this case.

10:18 25 This case is not about Dell products.

10:18 1 It's not about EMC products. It's about VMware  
10:18 2 products and only VMware products.

10:18 3 So in case there's any confusion about  
10:18 4 that, you're going to be hearing from VMware witnesses.  
10:18 5 You're going to be hearing me talking about VMware.  
10:18 6 That's what this case is all about.

10:18 7 So the two products that are at issue in  
10:18 8 this case, as you heard, are the vSphere product. And  
10:18 9 very importantly, that vSphere product is just  
10:18 10 software. VMware is a software company. Bits and  
10:18 11 bytes. Information.

10:18 12 With one exception, and that is the other  
10:18 13 product which is VeloCloud. VeloCloud is a bit of an  
10:18 14 aberration in VMware. VeloCloud was a company that  
10:18 15 made hardware products, including software products,  
10:18 16 that VMware acquired. That's the only circumstance  
10:18 17 that VMware ever sells hardware, is with respect to the  
10:19 18 VeloCloud stuff.

10:19 19 These two products are at issue in this  
10:19 20 case. And you're going to hear a ton about what they  
10:19 21 do.

10:19 22 But one thing that they do is the vSphere  
10:19 23 product does something called virtual machines. In  
10:19 24 fact, the VM in VMware stands for virtual machines.  
10:19 25 And ware means software. We sell virtual machine

10:19 1 software.

10:19 2 Virtual machines are like you have a  
10:19 3 single computer, but you have ten different people  
10:19 4 using that computer. And every one of them think that  
10:19 5 they have their own computer. That's what a virtual  
10:19 6 machine is. It sort of makes it look like you're using  
10:19 7 your own computer, even though you're not. That's what  
10:19 8 the software is.

10:19 9 Now, you're going to hear from two very,  
10:19 10 very impressive fact witnesses in this case.  
10:19 11 Mr. Turner, Paul Turner, and Mr. Craig Connors.

10:19 12 Paul Turner is the vice president at  
10:19 13 VMware who is in charge of vSphere. He knows  
10:19 14 everything about the product, what it does and what it  
10:19 15 doesn't do. He's going to testify a little bit later,  
10:20 16 probably tomorrow.

10:20 17 And then there's Craig Connors. Craig  
10:20 18 Connors is a very impressive guy, former Green Beret in  
10:20 19 the Army. He decided to go into technology and started  
10:20 20 one of the very first software-defined wide-area  
10:20 21 network companies, which is a brand new technology,  
10:20 22 which is now what VMware does in VeloCloud.

10:20 23 He wrote VeloCloud. He literally wrote  
10:20 24 the code for VeloCloud. So any questions you have  
10:20 25 about how that product works are going to be answered

10:20 1 by Mr. Connors.

10:20 2 Now, who is the plaintiff?

10:20 3 Now, you heard the plaintiff refer to  
10:20 4 themselves as Brazos. That is their name. Their name  
10:20 5 is also WSOU. That's how they incorporated.

10:20 6 WSOU is an acronym that includes the  
10:20 7 first letters of some of the founders. That's where  
10:20 8 that name comes from, in case you're wondering. I  
10:20 9 thought it might be a university or something, but it  
10:20 10 turns out that's what it is.

10:20 11 They were started in 2017, five years  
10:20 12 ago. And they had one purpose, to buy 8,000 patents  
10:21 13 from Nokia and make money from them.

10:21 14 That's Mr. Etchegoyen's business. He's  
10:21 15 been doing it for 20 years, buying patents and making  
10:21 16 money from them. And that's okay. That's a business  
10:21 17 model, but that's what this case is about.

10:21 18 They bought thousands of patents, and  
10:21 19 they tried to find some that they could assert against  
10:21 20 VMware and others and are now trying to make money on  
10:21 21 those patents.

10:21 22 They make no products. They make no  
10:21 23 inventions. They sell nothing. They create nothing.  
10:21 24 They're just trying to make money. Their only business  
10:21 25 is patent assertion.

10:21 1 Now, who did make these patents?

10:21 2 These inventions, these patents were  
10:21 3 developed by Alcatel-Lucent, which as you just heard  
10:21 4 was a company that Nokia bought.

10:21 5 Now, you -- we may have heard of Nokia.  
10:21 6 Nokia makes cell phones and that's what their business  
10:21 7 is. Their business is cell phones and cellular  
10:21 8 technology that goes into the network, you know, the 3G  
10:22 9 network. All those antennas connect to a bunch of  
10:22 10 computers. Nokia and Alcatel-Lucent make those  
10:22 11 computers.

10:22 12 It has nothing to do with what VMware  
10:22 13 does. It's a totally different area of technology. 3G  
10:22 14 and 4G and 5G, that's what Nokia's all about. VMware  
10:22 15 is about software that does virtualization.

10:22 16 Now, you also heard that Nokia has tens  
10:22 17 and tens of thousands of patents, and that's true.  
10:22 18 They're very sophisticated with their patents.  
10:22 19 Sometimes they assert them. Sometimes they license  
10:22 20 them. Sometimes they identify patents that are old  
10:22 21 that they don't use that don't have any value and sell  
10:22 22 them to someone else.

10:22 23 That's what happened here. They sold  
10:22 24 these patents to WSOU for \$2,000 a patent. That's what  
10:22 25 they sold them for, \$2,000 a patent.

10:22 1 They knew what they were selling.  
10:22 2 They're one of the most sophisticated patent companies  
10:22 3 in the world. And they sold these patents for that for  
10:22 4 good reason. They're old.

10:23 5 Now, you're going to hear our first  
10:23 6 witness, who's going to, I believe, come on tomorrow.  
10:23 7 His name is Kit Colbert. He is the chief technology  
10:23 8 officer of VMware. And that means he's in charge of  
10:23 9 the strategic technology vision. He doesn't know all  
10:23 10 the details of every product. We brought witnesses for  
10:23 11 that.

10:23 12 But he's going to talk about why we're  
10:23 13 here. He's been with the company for 20 years. He's  
10:23 14 seen it grow from almost nothing to where it is today.  
10:23 15 And he's going to testify about our culture of  
10:23 16 innovation. He's also going to testify about the fact  
10:23 17 that we respect IP.

10:23 18 There's no one that respects IP more than  
10:23 19 us. We have our own patents. We pay for technology  
10:23 20 when we use it, lots of examples of that. He'll talk  
10:23 21 about that.

10:23 22 When we don't use it, though, we don't  
10:23 23 pay for technology that we don't use. Any more than it  
10:23 24 would be fair for us to pay for rent on an apartment  
10:23 25 that we don't use, right? It's not fair to have

10:23 1 someone pay for something that we don't use.

10:23 2 So why are we here?

10:24 3 Well, the plaintiff's business model is  
10:24 4 sue and hope that the company settles because they  
10:24 5 don't want to go to court. That's the model.

10:24 6 Well, that's not what VMware is about.

10:24 7 VMware is here because we have been falsely accused.

10:24 8 I don't know -- I know I've been falsely  
10:24 9 accused of things, you know, all kinds of -- I mean,  
10:24 10 little things, big things, et cetera. And it's so  
10:24 11 frustrating. It's so frustrating to get up and defend  
10:24 12 yourself, right?

10:24 13 But that's the situation that we're in.  
10:24 14 We just don't use these patents. That's why we're  
10:24 15 here, because it's not fair to be accused of something  
10:24 16 that we don't do.

10:24 17 I want to say a word about the three  
10:24 18 patents that are at issue. If I were a jury -- if I  
10:24 19 were on a jury, I should say, in a patent case, I would  
10:24 20 be looking forward to the inventors coming up on the  
10:24 21 stand and saying what they invented and their aha  
10:24 22 moment, their eureka moment, here's why we changed the  
10:24 23 world and made the Internet faster.

10:24 24 That's -- it's not a true story, and  
10:24 25 that's why you're not going to have the inventors say



10:24 1 that. You're going to hear that from the lawyers and  
10:24 2 you're going to hear that from the paid experts that  
10:25 3 they brought. That's it. That's their only witnesses.

10:25 4 There's no inventors coming to this  
10:25 5 trial. There's no inventors that the plaintiff decided  
10:25 6 to depose, take their deposition and play their  
10:25 7 testimony so that you could hear it.

10:25 8 Now, if these were really groundbreaking  
10:25 9 patents, if these were really breakthrough patents that  
10:25 10 changed the world, wouldn't you expect that the  
10:25 11 inventors would come, that the plaintiff would bring  
10:25 12 the inventors to tell that story? You're not going to  
10:25 13 hear any of that.

10:25 14 So I do want to talk about the three  
10:25 15 patents, and I'm going to try to do so briefly. And  
10:25 16 Ms. Moye promised on Thursday that we're going to try  
10:25 17 to make this entertaining and engaging, and I'm going  
10:25 18 to try to do that as much as I can, even though it's  
10:25 19 highly technical.

10:25 20 But let me talk about the three patents.  
10:25 21 The first one we call the "monitor patent," the '360.  
10:25 22 The monitor patent.

10:25 23 You remember the Valvoline example. A  
10:25 24 monitor is a device that monitors, like a carbon  
10:26 25 monoxide monitor, and it sets an alarm if something's

10:26 1 not right. That's what a monitor is.

10:26 2 Now, the monitor patent was filed in  
10:26 3 2001. That's over 20 years ago. Now, think about what  
10:26 4 technology was like. I mean, we all know how much  
10:26 5 technology changes in 20 years. That's a long time for  
10:26 6 technology.

10:26 7 In 2001, AOL was how people got on the  
10:26 8 Internet. Doesn't exist anymore.

10:26 9 Remember the flip phones? There were no  
10:26 10 smartphones, right? Remember the flip phones, you had  
10:26 11 to text message people by pressing, like, 5 three times  
10:26 12 to get an L or something like that.

10:26 13 It -- that's what the technology was back  
10:26 14 then. TVs were huge. I remember I carried one of  
10:26 15 these things up three flights to my first apartment.  
10:26 16 The iPod just was introduced that carried a few hundred  
10:26 17 songs, right?

10:26 18 That's the state of technology 20 years  
10:26 19 ago. That's not what we see today. And the same is  
10:26 20 true -- in fact, it's even more true in software.  
10:26 21 Software changes like this.

10:27 22 So we're not saying the patents are  
10:27 23 expired. They're not expired. What we're saying is  
10:27 24 when they were invented was a long time ago. And it  
10:27 25 doesn't pertain to what we do now.

10:27 1 So as I said, the monitor patent is about  
10:27 2 a monitor, a physical device.

10:27 3 What did I say? We're a software  
10:27 4 company.

10:27 5 The company makes a product called  
10:27 6 vSphere. VSphere is software. You are not going to  
10:27 7 hear any evidence in this case that we sell any  
10:27 8 hardware that uses this patent. That's the end of the  
10:27 9 case.

10:27 10 They've said that we sell hardware. I  
10:27 11 mean, that's what they have to say, that we sell  
10:27 12 hardware. But there's no evidence in this case that we  
10:27 13 sell a physical monitor. That's the end of it.

10:27 14 So what do they point to?

10:27 15 They point to our software, but our  
10:27 16 software also doesn't have a monitor. And the reason  
10:27 17 is in the old days, 20 years ago, people used to make  
10:27 18 these things called schedulers.

10:27 19 Now, a scheduler is just something that  
10:28 20 says which traffic goes -- which data goes out first,  
10:28 21 right?

10:28 22 They used to make it in hardware. And so  
10:28 23 before you made it in hardware, they modeled it in  
10:28 24 software, and then they used a monitor to test it to  
10:28 25 make sure it worked. And then they'd spend all the

10:28 1 money to make it into hardware. That's what the patent  
10:28 2 talks about.

10:28 3 Okay. We don't do that. So what the  
10:28 4 patent talks about is two things: You've got a  
10:28 5 monitor, and then you've got this scheduler device.

10:28 6 The whole patent is about the monitor,  
10:28 7 not the scheduler. We don't have a monitor. And  
10:28 8 you're not going to hear any testimony that we sell a  
10:28 9 monitor. No evidence.

10:28 10 I don't know why we're here. I really  
10:28 11 don't. We don't have this.

10:28 12 And, you know, Counsel put up the claims  
10:28 13 real quick, but the claims are the star of the show. I  
10:28 14 agree. This is where the rubber meets the road. This  
10:28 15 is the scope of their invention.

10:28 16 And what is the first word of the claim?  
10:28 17 A monitor for monitoring the operation of a scheduler.  
10:29 18 It's not just a scheduler. It's a monitor. That's  
10:29 19 what they have a right to. We don't have a monitor.  
10:29 20 We don't have it. That's the end of this case.

10:29 21 Now, the next patent we call the '800  
10:29 22 patent because those are the last three numbers. This  
10:29 23 one was filed over ten years ago. We call this one the  
10:29 24 "minimizing network delay" patent.

10:29 25 Now, what was this patent trying to

10:29 1 solve?

10:29 2 Again, a problem that we don't face.

10:29 3 This patent was trying to solve the problem if you have  
10:29 4 in New York a computer that needs data and you have in  
10:29 5 Chicago a computer that has the data, what's going to  
10:29 6 happen if they try to connect to each other? Delay,  
10:29 7 right? I mean, that just makes sense.

10:29 8 So this patent is all about matching up  
10:29 9 computers that need data with computers that have the  
10:29 10 data -- they call it a compute node and a data node --  
10:29 11 matching them up to try to minimize the delay between  
10:30 12 the two.

10:30 13 So I'd rather match two computers that  
10:30 14 are in Chicago than a computer that's in Chicago with a  
10:30 15 computer that's in New York, right? That makes sense.

10:30 16 That's what the patent's about. Well,  
10:30 17 that's fine. That's an interesting idea. Nothing to  
10:30 18 do with what we do. Our stuff is all in the same  
10:30 19 location, right? We don't have geographic distance.  
10:30 20 We don't worry about that kind of latency.

10:30 21 When I say the word "latency," by the  
10:30 22 way, that's just the computer term for delay. You're  
10:30 23 going to hear a lot about the word "latency." Latency  
10:30 24 just means delay. It's the -- that's what the computer  
10:30 25 scientists use.

10:30 1 So the patent is all about the distance  
10:30 2 between a compute node and a data node, right, and  
10:30 3 trying to minimize the delay that happens.

10:30 4 Our products, we have something called a  
10:30 5 virtual machine, software that's inside the computer.  
10:30 6 There's no delay between those two things.

10:30 7 That's like saying what's the delay  
10:30 8 between me and this courtroom? I'm already here.  
10:30 9 There's no delay. There's no latency. I'm already  
10:31 10 here.

10:31 11 As a result, we don't try to minimize  
10:31 12 that latency. And you won't hear any evidence that we  
10:31 13 do.

10:31 14 So when you look at these claims --  
10:31 15 again, they were flashed up on the screen, but what do  
10:31 16 they say? Look at where it says in Claim 16, which is  
10:31 17 the claim that's asserted, and we're going to get into  
10:31 18 this -- I don't have a lot of time, we're going to get  
10:31 19 into this in great detail.

10:31 20 But if you look at Claim 16, it says:  
10:31 21 The assignment objective comprises minimizing a total  
10:31 22 latency.

10:31 23 Do you see on the right side there, it  
10:31 24 says "minimizing a total latency"?

10:31 25 There should be a way for me to touch it,

10:31 1 but I don't know how to do that. Oh, here it is.

10:31 2 See where it says "minimize a total  
10:31 3 latency"? That's what this is all about. We don't do  
10:31 4 that.

10:31 5 We don't even have Edges between the  
10:31 6 compute nodes and the data nodes. Our software's in  
10:31 7 the machine. There's no delay between the two of them.  
10:31 8 And so we don't do any of this stuff that's in this  
10:31 9 claim.

10:32 10 And what you're going to hear is you have  
10:32 11 to do every single thing in the claim, and it's their  
10:32 12 burden to show it. It's not our burden to show we  
10:32 13 don't. They have to show we do every single thing in  
10:32 14 this claim, and we don't do most of it.

10:32 15 Let me see if I can clear this. I did.

10:32 16 All right. Let me talk about the last  
10:32 17 patent. The last patent was filed 15 years ago. And I  
10:32 18 call this one the "call ahead patent." And you'll see  
10:32 19 why in a minute.

10:32 20 So this is the patent where -- you  
10:32 21 remember Counsel put up a picture of -- this picture,  
10:32 22 this four-node picture. And then a picture from our  
10:32 23 document. And did this cool graphic where they go over  
10:32 24 each other?

10:32 25 We're not disputing we have a network.

10:32 1 Of course we have a network. This patent's not about  
10:32 2 having a network. Everybody has a network. The  
10:32 3 question is, how does the network work? That's the  
10:32 4 question.

10:32 5 And the way this patent works, we call it  
10:32 6 the "call ahead patent" because when data comes into  
10:32 7 the network, you see where I have "entrance" there?  
10:32 8 Data comes into the network here.

10:32 9 And what it does is it asks, is the exit  
10:33 10 point congested? Is it busy? And if it is, it's going  
10:33 11 to send the packet slower. Or it's going to send them  
10:33 12 with lower priority. Or it's going to just drop them.

10:33 13 Because why rush if the exit point is  
10:33 14 busy? Sometimes you'll see this called the egress  
10:33 15 node. Egress node just means exit, right? That's what  
10:33 16 the patent is about.

10:33 17 And that's an interesting idea for what  
10:33 18 they were worried about. They were worried -- when I  
10:33 19 say "they" I mean Alcatel-Lucent. They were worried  
10:33 20 about the situation where they couldn't tell whether  
10:33 21 the endpoint of the network had too much traffic. And  
10:33 22 if they had too much traffic they would sometimes send  
10:33 23 traffic to a place that was already too busy.

10:33 24 We don't have to worry about that because  
10:33 25 the year after this patent was filed -- this was in



10:33 1 2006 -- in 2007, Mr. Connors, who you're going to hear  
10:33 2 from, Craig Connors, and a bunch of people invented a  
10:33 3 brand new technology called software defined networks.

10:34 4 Software defined is SD-WAN. Wide area  
10:34 5 network. Software defined wide area network. They  
10:34 6 invented it.

10:34 7 And that solves this problem. You don't  
10:34 8 have to look ahead anymore. Because they control how  
10:34 9 much data gets to the exit node. They know it's never  
10:34 10 going to be congested. They don't have to worry about  
10:34 11 what happens if it's congested.

10:34 12 So what do we do? What do they say we  
10:34 13 do? What our network does is if data comes into the  
10:34 14 network, all we do is we choose the best path. We  
10:34 15 never, ever, ever call ahead to see if the exit node is  
10:34 16 congested. And that -- by the way, that's what the  
10:34 17 patent's about.

10:34 18 So we tried to come up with an analogy.  
10:34 19 Analogies are interesting because they're never perfect  
10:34 20 and we do our best.

10:34 21 But the analogy is, let's say you want to  
10:34 22 go to the Olive Garden for dinner, okay? We've all  
10:34 23 experienced, you show up at -- well, if you like Olive  
10:34 24 Garden, you've experienced this. I do. You show up at  
10:34 25 the Olive Garden and there's 55 people waiting in the

10:35 1 lobby and it's going to be an hour-and-a-half wait.

10:35 2 So I just wasted my time driving all the  
10:35 3 way out here to the Olive Garden because it's too busy.  
10:35 4 That's what congested means, too busy, right?

10:35 5 So what does this patent talk about?  
10:35 6 It's not a terribly, you know, interesting idea. But  
10:35 7 the idea is you call ahead. You call the Olive Garden  
10:35 8 and you say, are you busy? And if you're busy, stay  
10:35 9 home and make spaghetti or go somewhere else. That's  
10:35 10 what the patent's about. You call ahead.

10:35 11 That's not what we do. What we do --

10:35 12 THE COURT: Mr. Rosenthal.

10:35 13 MR. ROSENTHAL: Five minutes?

10:35 14 What we talk about is it's like going to  
10:35 15 a Whataburger. You know you're going to get your  
10:35 16 burger quickly, right? I guess we're all -- we all  
10:35 17 have Whataburger on our minds. We both came up with  
10:35 18 the same analogy.

10:35 19 But you're not going to call ahead to a  
10:35 20 Whataburger. And we don't call ahead either. All we  
10:35 21 do is we choose the best path. We go on I-95 -- I-35  
10:35 22 rather than the local road. That's all we do. We  
10:35 23 never call ahead. And you're never going to see any  
10:35 24 evidence that we call ahead.

10:36 25 And so when you look at the claim of the

10:36 1 patent that talks about determining the congestion at  
10:36 2 the exit, we never, ever do it. And you won't hear any  
10:36 3 evidence that we do.

10:36 4           You're going to hear from Dr. Kevin  
10:36 5 Jeffay who's sitting in the back of the courtroom and  
10:36 6 Dr. Tajana Rosing. They're our technical experts.  
10:36 7 These are world-class experts in this field. They're  
10:36 8 professors of computer science.

10:36 9           Dr. Jeffay was, until this year, the  
10:36 10 chair of the University of North Carolina. And they're  
10:36 11 going to talk about why it is that we don't infringe.

10:36 12           Now, I want to talk about damages. And  
10:36 13 this is the only thing I want to say about damages.  
10:36 14 The amount of damages in this case is zero. If you  
10:36 15 find that they have not carried their burden of showing  
10:36 16 that we infringe, that we meet every single one of  
10:36 17 those elements, the case is over. Your work is done.  
10:36 18 There are no damages.

10:36 19           But I have to represent my client and  
10:36 20 say, well, what happens if you disagree? Because you  
10:36 21 are the only ones who get to decide that question.  
10:37 22 What would the damages be?

10:37 23           And the way that damages are measured is  
10:37 24 that you look at what would two parties have negotiated  
10:37 25 if they just sat down and negotiated a license to these

10:37 1 patents? And you're going to hear from -- I don't  
10:37 2 think she's here yet, but Ms. Julie Gonzalez, who's our  
10:37 3 senior vice president of finance. She's going to talk  
10:37 4 about all the costs that go into our products.

10:37 5           You're also going to hear from  
10:37 6 Dr. Stephen Becker, who's also in the courtroom.  
10:37 7 Dr. Becker's one of the world's most renowned valuation  
10:37 8 experts. He's based in Austin. He's been there for  
10:37 9 20 years. He's got a Ph.D. He's got a computer  
10:37 10 science degree.

10:37 11           And he will do what we would all do if we  
10:37 12 were trying to figure out what the right value is. If  
10:37 13 you had a house and you wanted to know how much is my  
10:37 14 house worth, what would you do? Look at comps.  
10:37 15 Comparables. Similar houses in the same neighborhood.  
10:37 16 How much do those go for? And that's what Dr. Becker  
10:37 17 does. That's what every good damages expert does, look  
10:38 18 at comps.

10:38 19           And in this case, WSOU actually licensed  
10:38 20 their entire portfolio of patents several times to tech  
10:38 21 companies that are, like VMware, in this business and  
10:38 22 actually bigger than VMware. They licensed to AT&T for  
10:38 23 2 million, Amazon for 1.8, Facebook for 1 million. And  
10:38 24 they made an offer to Dell which included VMware at the  
10:38 25 time for 2.5 million.

10:38 1 And they say, well, we didn't know what  
10:38 2 we had. Mr. Etchegoyen has been in this business for a  
10:38 3 long time. They knew what they had. They knew what  
10:38 4 the assets were. And this is the price that they put  
10:38 5 on the entire portfolio of patents.

10:38 6 So if you're asking how much are the two  
10:38 7 patents that you're being asked to determine damages  
10:38 8 for, how much are those worth? Well, it should be less  
10:38 9 than this. But that's not what they're asking for.

10:38 10 They got an expert who works for  
10:39 11 plaintiffs all the time to say that the right measure  
10:39 12 of damages here is \$81 million. Even though they've  
10:39 13 licensed all these other tech companies for 1 to  
10:39 14 \$2 million.

10:39 15 And by the way, they licensed the entire  
10:39 16 portfolio of 8,000 patents for 1 to \$2 million. And  
10:39 17 their damages expert is only talking about two of those  
10:39 18 patents and how much those are worth. That doesn't  
10:39 19 make sense.

10:39 20 Remember I said this case is about common  
10:39 21 sense? That's a perfect example. Does it make sense  
10:39 22 that these patents that they licensed for a million or  
10:39 23 two dollars, that the parties would have sat down and  
10:39 24 negotiated a license for \$81 million? That doesn't  
10:39 25 make sense.

10:39 1 Does it make sense that VMware, a  
10:39 2 software company in the area of virtual machines, would  
10:39 3 use 20-year-old technology from a cellular technology  
10:39 4 company that they've never heard of? They've never  
10:39 5 heard of these patents, VMware. They've never heard of  
10:40 6 the inventors. You're going to hear all of that. They  
10:40 7 can't say, oh, I'd like to use this technology. They  
10:40 8 did something completely different.

10:40 9 So that's what this case is about. And I  
10:40 10 would like to ask for your commitment to wait to hear  
10:40 11 all of the evidence. Plaintiff gets to go on first.  
10:40 12 That's the nature of these things, right?

10:40 13 And they've got very good lawyers. And  
10:40 14 they've got very practiced and seasoned witnesses who  
10:40 15 are going to get up there and tell you their story that  
10:40 16 they've told many times, right? And so that's fine.

10:40 17 But I'd like for you to wait to hear our  
10:40 18 side of the story before you make your decision.  
10:40 19 Because what I submit to you is that when you listen to  
10:40 20 these witnesses, you will not see a single piece of  
10:40 21 evidence that we do what's in these claims.

10:40 22 We don't have a monitor. We don't sell  
10:40 23 any hardware with our vSphere product. We don't look  
10:40 24 at latency costs when we're assigning these things in  
10:40 25 the way that the claim requires. And we never call

10:40 1 ahead. We never call ahead. Because we don't have to.

10:40 2 So that's all. The evidence is going to  
10:41 3 go in. I am going to get a chance to talk to you at  
10:41 4 the end of the case. But I just want to thank you  
10:41 5 again for your attention. I know we all have things  
10:41 6 that are very important in our lives, family and jobs  
10:41 7 and things that we'd rather be tending to. But we  
10:41 8 really appreciate it.

10:41 9 This case is very important, very  
10:41 10 important to us. And we thank you and I'll talk to you  
10:41 11 soon.

10:41 12 THE COURT: You may call your first  
10:41 13 witness.

10:41 14 MR. WALDROP: Your Honor, we call Craig  
10:41 15 Etchegoyen. As I said before, Ms. Kim is going to be  
10:41 16 doing his -- her examination. This is her first time  
10:41 17 in your court doing an examination, Your Honor.

10:41 18 (The witness was sworn.)

10:42 19 MS. KIM: Good morning. Thank you for  
10:42 20 having me. It's my first time, so if I'm a little  
10:42 21 nervous, that's probably why.

10:42 22 DIRECT EXAMINATION

10:42 23 BY MS. KIM:

10:42 24 Q. Good morning, Mr. Etchegoyen. Could you  
10:42 25 please introduce yourself to the ladies and gentlemen

10:42 1 of the jury?

10:42 2 A. Sure. Hi. My name's Craig Etchegoyen. I'm  
10:42 3 the founder and chairman of Brazos.

10:42 4 Q. Could you please tell the jury where you  
10:42 5 currently live?

10:42 6 A. I split my time between Southern California  
10:42 7 and Texas.

10:42 8 Q. And could you please tell us a little bit  
10:42 9 about your family?

10:42 10 A. Sure. I have three beautiful children, an  
10:43 11 amazing wife that made those beautiful children. And I  
10:43 12 come from a big family. I have -- there's six of us.  
10:43 13 I have four -- I have four sisters and one brother.

10:43 14 Q. And I think you told us you were a Brazos  
10:43 15 chairman and founder.

10:43 16 Could you please tell us what that means, what  
10:43 17 your role is?

10:43 18 A. I handle -- I handle the licensing. So our  
10:43 19 technology portfolio, I handle most of the licensing  
10:43 20 for Brazos.

10:43 21 Q. And please tell us why you're here today.

10:43 22 A. I'm here to defend our property, our  
10:43 23 intellectual property, and stop VMware from stealing  
10:43 24 it.

10:43 25 Q. I'd like to talk a little bit more about you.



10:43 1 I know you've had a pretty interesting life, so I'd  
10:43 2 like to talk a little bit about your background and the  
10:43 3 events leading us to today.

10:43 4 Could you please tell us about your education  
10:44 5 level?

10:44 6 A. Sure. Excuse me. I graduated high school. I  
10:44 7 did a smattering of classes in local college of things  
10:44 8 that I was interested in, some computer science  
10:44 9 courses, some mathematics courses, things like that,  
10:44 10 just a couple.

10:44 11 Q. What do you mean by "computer science  
10:44 12 courses"? What do those teach?

10:44 13 A. I was really interested in -- from a young  
10:44 14 age, really interested in how computers and software  
10:44 15 worked in general. Started very young with that, and I  
10:44 16 was always interested in learning more. This was a  
10:44 17 little while ago, quite sometime ago. But I was always  
10:44 18 interested in how computers and software worked.

10:44 19 Q. Could you please tell us about your first job?

10:44 20 A. Sure. That was -- if you could call it a job,  
10:44 21 I started -- when I was 13, about 13 years old, I was  
10:45 22 on the -- from 13 till about 18, a small portion of  
10:45 23 19 years old, I was on the professional surfing tour.  
10:45 24 And that was my -- that was my first job, if you can  
10:45 25 call it that.

10:45 1 I was blessed to travel kind of around the  
10:45 2 world surfing and surfing in the competitions. That  
10:45 3 was my first job.

10:45 4 Q. So I think you just told us you started  
10:45 5 professionally surfing on tours at age 13, which I  
10:45 6 think I was in school at that time when I was 13.

10:45 7 How did you attend school when you were on  
10:45 8 these tours?

10:45 9 A. I -- my mom, amazing lady, let her 13-year-old  
10:45 10 son -- maybe because she had so many kids, let her  
10:45 11 13-year-old son kind of travel the world. And her  
10:45 12 prerequisite to that with the sponsors, the companies  
10:45 13 that paid for me to go around the world, she made sure  
10:45 14 that they were -- that I had tutors.

10:46 15 It was -- she was -- that was her deal killer,  
10:46 16 as she said. So those tutors taught me -- taught me a  
10:46 17 bunch. I'm grateful for that.

10:46 18 Q. What were some of the subjects that you were  
10:46 19 very drawn to by your tutors?

10:46 20 A. I -- I -- I really -- again, when I was 13 and  
10:46 21 on, I was really in love with programming, software  
10:46 22 languages. I got a very, very good one-on-one  
10:46 23 education for, you know, even early languages like  
10:46 24 COBALT assembler, the C languages. Just mostly -- I  
10:46 25 was mostly into -- I was mostly into the computer

10:46 1 languages at that time.

10:46 2 I liked math too. I wasn't -- I wouldn't say  
10:46 3 I was exceptional with that. I just had a lot of time  
10:46 4 on my hands being, you know, 13, 14 and 15 when  
10:46 5 everyone else is like 26. They're all very nice but --  
10:47 6 competing against them, but, you know, I had a lot of  
10:47 7 time in my -- in various hotel rooms to try and learn  
10:47 8 some more things that I was interested in.

10:47 9 Q. What did you do -- I assume you are no longer  
10:47 10 a professional surfer.

10:47 11 What did you do after your professional  
10:47 12 surfing ended?

10:47 13 A. I was a lot lighter back then.

10:47 14 So after that -- my plan was always to --  
10:47 15 again, mom again put in my head, hey, you have to get  
10:47 16 an education. This surfing thing is great,  
10:47 17 congratulations. But you have to get educated or  
10:47 18 you're going to have problems.

10:47 19 So now I was -- I was afraid of her.

10:47 20 So I went back -- my plan was always to go  
10:47 21 back to be kind of a regular kid, go back to high  
10:47 22 school. So I went back about halfway through senior  
10:47 23 year in high school to just be normal and start  
10:47 24 thinking about colleges.

10:47 25 I got fairly good grades. So I had -- I was

10:48 1 fortunate enough to have options with college and what  
10:48 2 colleges I could attend.

10:48 3 Q. Did you end up going to college?

10:48 4 A. No. It was a tough one. So I -- maybe like  
10:48 5 my kids sometimes, I didn't know how expensive college  
10:48 6 was. So I had a little bit of money saved from surfing  
10:48 7 and I had written -- I'd started writing this product  
10:48 8 and I kind of had -- I had a choice to make.

10:48 9 I had enough money to maybe pay for, I don't  
10:48 10 know, 80 percent of college the first year and then not  
10:48 11 enough to obviously finish.

10:48 12 So I had a choice to either start my company  
10:48 13 or take my product that I was -- or that I had worked  
10:48 14 on and make a real company out of it.

10:48 15 Q. You keep referring to "a product." Can you  
10:48 16 tell us what this product was?

10:48 17 A. Sure. Sorry.

10:48 18 Q. That's okay.

10:48 19 A. I've only done this once before.

10:49 20 So the product was -- so when I was traveling  
10:49 21 around, I could -- it was difficult to get ahold of my  
10:49 22 family, get ahold of my mom. Hotel rooms back then,  
10:49 23 and now, but hotel rooms, it cost, like, \$100 to call  
10:49 24 my mom depending on where I was internationally. So it  
10:49 25 was just, like, that was out of my reach at that time.

10:49 1 So I figured out, my mom had an old fax  
10:49 2 machine, like, with the rolls in her bedroom. And I  
10:49 3 figured out how to send an e-mail to her fax machine at  
10:49 4 home so I didn't have to call all the time. I could  
10:49 5 just say, hey, don't worry. Your son is alive. This  
10:49 6 is where I am. I'm being taken care of. I'm in a --  
10:49 7 she always was wondering if I was eating. You know,  
10:49 8 I'm eating. I'm okay. I'm there. And this is my plan  
10:49 9 for probably the next week.

10:49 10 So that was my first -- that was my first  
10:50 11 product.

10:50 12 Q. And what was that product called?

10:50 13 A. The company was called Any Fax Solutions.

10:50 14 Q. Was the product successful, Any Fax?

10:50 15 A. It was. Had a lot of smart people that came  
10:50 16 in and helped me. We had hundreds of licensees, like  
10:50 17 the large companies, like even as big as maybe VMware  
10:50 18 at some point.

10:50 19 Yeah. It was -- I -- at the time, I mean,  
10:50 20 again being young, I thought it was like -- I thought I  
10:50 21 was, like, I hit a home run. It was -- yeah. It was  
10:50 22 very successful.

10:50 23 Q. And what became of Any Fax Solutions?

10:50 24 A. Software distributors distributed it. Back  
10:50 25 then, there were like IBM and Cisco. There were

10:50 1 software -- or companies that used to distribute  
10:50 2 software to corporate business-to-business they used to  
10:50 3 call it.

10:50 4 I also -- they -- my technology would be  
10:50 5 embedded, built into products like when -- when you  
10:51 6 would -- when you'd get, like, a sandwich, you know, a  
10:51 7 coupon for a sandwich delivered to your office, if you  
10:51 8 guys ever experience that, they used to send -- they  
10:51 9 used to use my technology for that.

10:51 10 And mortgages, like banks used it a lot. It's  
10:51 11 ultimately what became, I think it's called JFax and  
10:51 12 eFax now. They do like \$2 billion a year. They're  
10:51 13 giant.

10:51 14 Q. So after your affiliation with Any Fax ended  
10:51 15 or you sold it, what did you do after that? What was  
10:51 16 your next job?

10:51 17 A. It sounds silly now, but I did -- I did a  
10:51 18 company called United Logistics. Similar technology, I  
10:51 19 took -- it was a -- it was called a dialer box. It was  
10:51 20 so hard back then. Now you could probably do it in a  
10:51 21 day, someone smart could.

10:51 22 But my friend, surfing friend told me about  
10:51 23 like UPS, FedEx, all the big logistic centers and, you  
10:52 24 know, just shipping stations around the world, they  
10:52 25 were getting about \$250,000 a month long distance.

10:52 1 Because if a package was going from Waco to Paris, that  
10:52 2 bill of lading, the tracking document would be faxed.

10:52 3 Some places still do it. It's wild. But  
10:52 4 there were these giant tumbler -- they're called  
10:52 5 tumbler rooms. I got to visit them early on. And they  
10:52 6 were, like, these giant fax machines that just faxed  
10:52 7 all day long distance.

10:52 8 So they were spending like \$250,000 a month  
10:52 9 per location on average. And I figured out if I could  
10:52 10 plug my little dialer box in the back of those and then  
10:52 11 call a local number -- someone mentioned AOL in their  
10:52 12 opening.

10:52 13 I bought -- AOL -- I bought a POP. So AOL, if  
10:52 14 anyone's ever used that with, like, the beep, beep,  
10:52 15 beep, that thing, it's -- that was calling a local  
10:52 16 number.

10:52 17 So I figured out how to turn that into a local  
10:52 18 call and manage the software that way. And it saved  
10:52 19 them, like, about, I think, 80 percent discount to what  
10:53 20 they were making. So they could pay me a fee. That  
10:53 21 was fun.

10:53 22 Q. And what was that company called again?

10:53 23 A. United Logistics.

10:53 24 Q. And what became of United Logistics?

10:53 25 A. Computer Consortium licensed it. I think

10:53 1 Computers -- this was quite sometime ago -- Computer  
10:53 2 Associates, IBM, they sold the product.

10:53 3 I think Computer Associates now kind of owns  
10:53 4 that entire logistics market. I could be wrong, but I  
10:53 5 think so.

10:53 6 Q. So after Any Fax and then after United  
10:53 7 Logistics, what was your next job? What did you do  
10:53 8 next?

10:53 9 A. Next, I did a company called Senior Explorer,  
10:53 10 Explorer Systems. I wasn't very good with the names.  
10:53 11 So Senior Explorer, Explorer Systems.

10:53 12 Q. And what was Explorer Systems or Senior  
10:53 13 Explorer?

10:53 14 A. So my grandma, who's gone now, but she was the  
10:53 15 smartest lady -- smartest person I've ever known. She  
10:54 16 was like -- she was a controller and a CFO forever.  
10:54 17 Until a couple of years before she died, she worked  
10:54 18 real hard. But she was one of the first people I knew  
10:54 19 that had a computer.

10:54 20 So I started saying, come on, Grammy. Like,  
10:54 21 you got to get on the Internet. It's really cool. I  
10:54 22 can send you pictures. It might take 20 minutes to  
10:54 23 download, but I can send you pictures.

10:54 24 And I -- so, in essence, I -- she was having a  
10:54 25 lot of trouble. So I ended up designing this software



10:54 1 system that was really easy for her to use. It was  
10:54 2 kind of like the original iPad. Even -- there was even  
10:54 3 touchscreen models and PC models, big buttons.

10:54 4 Q. What's an NPC model?

10:54 5 A. No. Sorry. And PC model.

10:54 6 Q. And PC. I'm sorry.

10:54 7 A. PC model. So iPad and then a mouse and a  
10:54 8 keyboard, but really easy to navigate. It was -- it  
10:54 9 was a wonderful product.

10:54 10 So yeah. I designed that with help from my  
10:55 11 grandma. She loved it. She was -- she only started  
10:55 12 using that system. So I was like, wow. That's really  
10:55 13 cool. Loved it.

10:55 14 That grew into I called -- this is how brave  
10:55 15 you are when you're young, I guess. I cold-called the  
10:55 16 CEO of a group called AARP, which at the time was the,  
10:55 17 still is I think, the largest kind of consortium of  
10:55 18 senior citizens in the country.

10:55 19 I even get those things in the mail sometimes.  
10:55 20 So they -- I got ahold of the CEO and I said, hey, I  
10:55 21 made this thing for my grandma. I want to show it to  
10:55 22 you. And that turned into, you know, like, a huge  
10:55 23 blessing.

10:55 24 My focus group of one turned into a  
10:55 25 significant focus group. And they let me do these

10:55 1 groups, and I started designing it for kind of a  
10:55 2 broader audience, not just my grandma. And that turned  
10:56 3 into them marketing it.

10:56 4 At the time, again, I didn't really know a lot  
10:56 5 of this stuff, but it was like a Super Bowl ad, you  
10:56 6 know. It was really expensive to market to their  
10:56 7 group, to the -- I think it was like 50 million  
10:56 8 households.

10:56 9 That product turned into millions and millions  
10:56 10 of users. It was the first fully contained  
10:56 11 Internet-access, easy-to-use device. It was awesome.  
10:56 12 That was really rewarding.

10:56 13 Q. And what became of Senior Explorer, Explorer  
10:56 14 Systems?

10:56 15 A. So we licensed Oracle. Oracle's a big  
10:56 16 database company. Intel. And I did a bunch of stuff  
10:56 17 like -- this is dating me a little, Radio Shack,  
10:56 18 Circuit City, Target.

10:56 19 I did, more or less, similar hardware models.  
10:56 20 I did something called Junior Explorer that was for  
10:56 21 kids. And it was again an iPad. There was this thing  
10:57 22 called the iToaster that went into your -- similar to  
10:57 23 what Facebook/Meta does now where you can, like, video  
10:57 24 conference and pull up recipes in your kitchen. It was  
10:57 25 like a little less expensive than an iPad.

10:57 1 I did -- I went crazy on hardware versions. I  
10:57 2 loved it so much I spent -- bad business move on that,  
10:57 3 so I ended up spending a ton of money on the hardware  
10:57 4 development because I just loved it so much.

10:57 5 But yeah. I ended up licensing it out. I  
10:57 6 believe Oracle and Intel still use the management  
10:57 7 system and the software to manage their terminal  
10:57 8 services. So because it was so easy to use and  
10:57 9 probably inexpensive for them, they -- they used it a  
10:57 10 lot for businesses like terminals like this. So it  
10:57 11 would manage these types of things for banks and other  
10:57 12 companies.

10:57 13 Sorry that was long-winded. So...

10:57 14 Q. That's okay.

10:57 15 There's water and little cough drops, if you  
10:57 16 need --

10:57 17 A. Oh. Thanks. Sorry.

10:57 18 Q. No problem.

10:57 19 So after you sold off Senior Explorer, what  
10:58 20 did you do next?

10:58 21 A. A friend of mine, again, surf friend, said,  
10:58 22 hey, you got to meet this wild Australian guy. He  
10:58 23 surfs. He's an inventor. You'll love him. And his  
10:58 24 name's Rick Richardson. He's older than me.

10:58 25 And I met him and started a company called

10:58 1 Uniloc, U-n-i-l-o-c. He came up with the name, not me.  
10:58 2 So if you like it, he deserves the credit.

10:58 3 Q. Could you tell the jury just in a couple of  
10:58 4 sentences what is Uniloc?

10:58 5 A. Uniloc was -- and the company -- it was a  
10:58 6 substantial company. So Rick had come to me with this  
10:58 7 idea. He had partnered with IBM. And for a while --  
10:58 8 he's Australian, so IBM Australia. And he came to me  
10:58 9 with this concept.

10:58 10 And I had been working on -- I'd been working  
10:58 11 on security products. I was really into security,  
10:59 12 developing unique identifiers. So like, if someone  
10:59 13 stole your -- if someone stole your identifier -- like  
10:59 14 now it's your social security number.

10:59 15 But I was working on identifiers for computing  
10:59 16 devices so if you got hacked, you wouldn't be in  
10:59 17 trouble because the number string wouldn't mean  
10:59 18 anything to anybody. I was, like, always really  
10:59 19 worried about that.

10:59 20 So I took all the security stuff I was working  
10:59 21 on and tinkering with -- I've always kind of tinkered  
10:59 22 around with ideas. So I took -- I took those concepts  
10:59 23 that I'd been working on and Rick -- and started  
10:59 24 talking to Rick about it. And we were collaborating.

10:59 25 It turned into Uniloc software activation,

10:59 1 Uniloc cybersecurity, so Net Authority and Device  
10:59 2 Authority were the names of those companies. And then  
10:59 3 what I just explained was BlueCava was the name. And  
10:59 4 it was -- it was advertising identities.

10:59 5 It was -- so like -- if I like -- I like John  
10:59 6 Deere tractors on my phone, it'll deliver, you know, an  
11:00 7 ad, a John Deere ad to my TV or my Apple TV.

11:00 8 But what was so cool about it, and it's still  
11:00 9 here now. The companies use it. Is that that  
11:00 10 information, if it gets out, is meaningless. It's --  
11:00 11 they can't resell it on the dark web. Like, you can't  
11:00 12 do anything with it. It's just a number string. So  
11:00 13 it's really cool stuff.

11:00 14 Q. Let's take those one by one. I think you said  
11:00 15 the first of the three sort of broad categories, you  
11:00 16 said was software activation.

11:00 17 Could you please tell the jury what that is?

11:00 18 A. Sure. We invented -- I've done about 100 -- I  
11:00 19 don't know what the exact number is. I've done about  
11:00 20 100 patents myself. A lot of them were around device  
11:00 21 identity.

11:00 22 So software activation was Microsoft, for  
11:00 23 example. They use it. So Microsoft, when you have --  
11:00 24 way back when, you used to get Microsoft on a CD --  
11:00 25 Windows or Office on a CD. And your CD would come with

11:01 1 an unlock code on it.

11:01 2 So I would load it on my computer or my  
11:01 3 computer would come preloaded with it. And then the  
11:01 4 unlock code would unlock it.

11:01 5 The problem that Microsoft was having, they  
11:01 6 were losing tens of billions of dollars, because I  
11:01 7 could share that CD with you guys with -- or 10,000 of  
11:01 8 my closest friends.

11:01 9 So they realized that the way to solve that  
11:01 10 problem was our technology. IBM had made them aware of  
11:01 11 it. And that was the way to solve the problem.

11:01 12 So much so -- so much so that they ended up --  
11:01 13 they tried to buy the company or buy that division of  
11:01 14 the company. And we didn't -- we didn't want to sell  
11:01 15 it. I didn't want to sell it.

11:01 16 So that turned into the software activation  
11:01 17 group. It was very -- it was great, but difficult.  
11:01 18 That software activation group turned into a  
11:02 19 significant -- like this, Microsoft being a huge  
11:02 20 company -- turned into a very long, almost a decade of  
11:02 21 my life, believe it or not, litigation. When I  
11:02 22 wouldn't sell them my technology, they said they were  
11:02 23 going to kill me.

11:02 24 So that turned into ten years of my life.  
11:02 25 My -- he had said I've been doing this a long time.

11:02 1 That's when I started I guess, enforcing my inventions.

11:02 2 But they -- it took -- it's about -- it was  
11:02 3 about nine and a half years. My business partner and  
11:02 4 until this day one of my best friends, it almost killed  
11:02 5 him. So he ended up retiring. He couldn't handle it  
11:02 6 anymore.

11:02 7 But this story had a -- it has a happy ending.  
11:02 8 We did this. And a jury awarded us almost half a  
11:02 9 billion dollars. Because it was so important, such an  
11:02 10 important component in Microsoft's technology.

11:02 11 So Uniloc ended up having a significant  
11:03 12 licensing business. We licensed Microsoft. My  
11:03 13 patent's licensed by Apple. My technology, it's in  
11:03 14 the -- it's in the iPhone. Lots of products. Lots of  
11:03 15 companies have used and licensed the patents.

11:03 16 Q. And that's still today. They currently  
11:03 17 license currently today?

11:03 18 A. Yeah. I mean, us. Sorry. I don't want to  
11:03 19 mix it. But Brazos -- Microsoft -- Microsoft, for  
11:03 20 very -- a ton of money, licensed Brazos technology and  
11:03 21 our patents as well. I think they said their --  
11:03 22 Microsoft's a customer of theirs. So yeah, Microsoft  
11:03 23 licensed some of that from us.

11:03 24 Q. As well as the software activation inventions  
11:03 25 you --

11:03 1 A. Yes.

11:03 2 Q. -- did a long time ago?

11:03 3 A. Yes, ma'am.

11:03 4 Q. I think you told the jury a little while ago  
11:03 5 about you -- and we heard in opening statements with  
11:03 6 Mr. Waldrop as well, that you are a inventor and you  
11:03 7 have over 100 patents.

11:03 8 Could you please tell the jury about the  
11:03 9 process of getting a patent?

11:03 10 A. It's, like, almost impossible. It's so hard.  
11:04 11 You spend -- as an inventor, you know, you come up with  
11:04 12 this idea. And you build, you know, a product or a  
11:04 13 service around it. And you spend, you know, five  
11:04 14 years, sometimes ten years as an inventor.

11:04 15 It's too expensive. I mean, I've tried to  
11:04 16 help -- I have helped other inventors on that side.  
11:04 17 It's like could be 100 -- \$150,000. And you don't even  
11:04 18 know if you're going to get it granted.

11:04 19 It's a really long process. There's this  
11:04 20 group of experts at the Patent Office that grill you  
11:04 21 constantly. And you have to have very expensive  
11:04 22 attorneys. No offense to --

11:04 23 Q. Not me.

11:04 24 A. You have to have very expensive attorneys to  
11:04 25 do all that paperwork. Or at least I do. I couldn't



11:04 1 do. I couldn't do a lot of it. So it's very expensive  
11:04 2 and takes years and years and years and years.

11:04 3 And it also -- and, you know, litigate -- like  
11:04 4 having to litigate those. You go through it all over  
11:04 5 again. Like, even with Microsoft and other cases, you  
11:05 6 go through it again. So you have to make it all the  
11:05 7 way through the gauntlet of all of this stuff.

11:05 8 And I feel blessed to be here for sure. But  
11:05 9 it took years. And you go -- then after you get it  
11:05 10 granted and someone steals it, you have to go back to  
11:05 11 the Patent Office, pay more money. You know, sometimes  
11:05 12 \$500,000, right? And then just so the defendant can  
11:05 13 throw it out, try and throw it out again.

11:05 14 And then, I mean, fortunately you get here.  
11:05 15 And we won, you know -- or Microsoft, we won all of  
11:05 16 that. They spent tens of millions of dollars trying to  
11:05 17 do that against little old me. So anyway.

11:05 18 Yeah, that's kind of the process. It's really  
11:05 19 hard.

11:05 20 And then when you talk about international,  
11:05 21 protecting your product, it's really important to  
11:05 22 protect internationally as well, especially with  
11:05 23 software. Because it -- a lot of like Huawei, like  
11:05 24 Chinese companies will come to the U.S., take your  
11:06 25 technology and try and sell it worldwide. So you have

11:06 1 to protect in other countries as well, which is even  
11:06 2 more expensive.

11:06 3 Q. So I want to ask you a couple of things. So  
11:06 4 you talked about Apple and them being licensed as well.  
11:06 5 Can you give us an example of some of the inventions  
11:06 6 that they're licensing?

11:06 7 A. Yes. The other company -- the company that we  
11:06 8 incubated in Uniloc was Device Authority and Net  
11:06 9 Authority.

11:06 10 Q. And that's the second sort of branch that you  
11:06 11 talked about?

11:06 12 A. Yeah. That was the second branch.

11:06 13 So I don't have my phone. Normally I would  
11:06 14 show you on my phone.

11:06 15 So if you guys are familiar with what an  
11:06 16 accelerometer does, I'll just give you one example.  
11:06 17 There's a lot. We did a lot in this area.

11:06 18 But an accelerometer is what tracks your  
11:06 19 motion of your phone, like when you move it or if you  
11:06 20 play a game or if you change your screen, it'll change  
11:06 21 your, you know, the -- which is kind of a nightmare  
11:06 22 sometimes -- it'll change the orientation of your  
11:06 23 screen. But it counts your footsteps. That's your  
11:06 24 accelerometer on your Apple Watch or your phone.

11:07 25 I figured out how -- the way we move our

11:07 1 phones and the way we walk is unique to us, believe it  
11:07 2 or not. I didn't -- it was amazing. So I figured out  
11:07 3 how to extract the digital DNA of that out of the phone  
11:07 4 and more or less have a unique identifier based on the  
11:07 5 way your phone moves.

11:07 6 Also did things like, if you notice on the  
11:07 7 screens, you can't see them but there's -- it's called  
11:07 8 pixel mapping. You can't see them because there's  
11:07 9 burnt pixels that don't, you know, sometimes you can  
11:07 10 see them on your screen. But that's also unique to  
11:07 11 your device. So I figured out how to do -- how to do  
11:07 12 that and create a unique identifier for that.

11:07 13 We've done -- that company has done everything  
11:07 14 from protecting a -- I don't have one of these, but  
11:07 15 protecting, like, smart fridges and, like, home  
11:07 16 appliances that are connected so hackers can't get into  
11:07 17 your house via those devices.

11:07 18 All the way to the U.S. military, which I --  
11:08 19 that was my project. I loved that. Ground  
11:08 20 communications. So adversaries, like in Afghanistan,  
11:08 21 can't breach into the connection because their computer  
11:08 22 ID doesn't match. It was awesome. Sorry.

11:08 23 Q. No. Don't apologize.

11:08 24 I think a third category you talked about was,  
11:08 25 I think you called it BlueCava for advertising.

11:08 1 Could you please tell us about that?

11:08 2 A. Yes. I touched on that a little earlier.

11:08 3 That company became -- it's a big company. It became

11:08 4 Qualia. They -- that's what they do. They deliver

11:08 5 predictive ads without taking user information, without

11:08 6 breaching your -- what I think is your God-given

11:08 7 American right not to give up your personal data.

11:08 8 So they deliver ads, really good ads, accurate

11:08 9 ads based on that information.

11:08 10 Q. That was sort of a John Deere tractor --

11:08 11 A. Yes, ma'am.

11:08 12 Q. -- that you talked about.

11:08 13 I want to go back to something you said

11:08 14 earlier about how long and expensive it is to get a

11:08 15 patent.

11:09 16 Why did you file so many patents?

11:09 17 A. Well, in 2003, I didn't have any -- all my

11:09 18 other companies that we had talked about, I was just --

11:09 19 I didn't really know much about patents. And I was

11:09 20 like, wow. That's expensive. I don't know if I want

11:09 21 to do it.

11:09 22 And I just -- I didn't know how important they

11:09 23 were to inventors and to companies in general until

11:09 24 Microsoft stole our code and stole our technology.

11:09 25 I had no idea. I literally went to -- I went

11:09 1 to these law firms and I said, hey, what do I -- what  
11:09 2 do I do here? Like, IBM, who was a great partner, gave  
11:09 3 Microsoft our code. It's in every product. What do I  
11:09 4 do?

11:09 5 And they said, well -- I thought -- I thought  
11:09 6 copyright, because I was just naive to it, but I  
11:09 7 thought copyright. Oh, it's my code. It's  
11:09 8 copywritten. They're like, no. That will never work.  
11:10 9 You will lose.

11:10 10 Q. About how old were you here in this time  
11:10 11 frame?

11:10 12 A. So that was -- I just had my birthday the  
11:10 13 other day, the day before we were here at jury  
11:10 14 selection. So I was -- so I was like 25, 26, something  
11:10 15 like that.

11:10 16 And so, anyway, that was the -- that was the  
11:10 17 reasoning behind it. They said, hey -- and we had --  
11:10 18 we had a couple of patents in process, one granted.  
11:10 19 They're like, look. This is your only -- like, you  
11:10 20 have to go -- you have to go after Microsoft for patent  
11:10 21 infringement.

11:10 22 THE COURT: Ladies and gentlemen, we're  
11:10 23 going to take a very short morning recess. Please do  
11:10 24 not discuss the case amongst yourselves. We'll be back  
11:10 25 in about five or ten minutes.

11:10 1 THE BAILIFF: All rise.

11:10 2 (Jury exited the courtroom.)

11:11 3 THE COURT: Thank you. You may be

11:11 4 seated.

11:11 5 Let me make very clear: We're not going

11:11 6 to hear anything else about Microsoft or theft or

11:11 7 anything that's not relevant to the case, number one.

11:11 8 Number two, if the plaintiff again gets

11:11 9 into the fact that this is a David-versus-Goliath

11:11 10 effort, that the defendant is a big, evil corporation,

11:11 11 it's the little guy against the big company, I will say

11:11 12 something in front of the jury that the plaintiff will

11:11 13 not care for.

11:11 14 I don't know where this gentleman's

11:11 15 going. I don't know why we've taken the amount of time

11:11 16 we've taken with him. He's already misrepresented

11:12 17 things. It's not impossible to get a patent. He's

11:12 18 given the jury that impression. We're on ten million

11:12 19 patents right now, maybe higher.

11:12 20 But so if you don't reign in what you're

11:12 21 doing, I will in front of the jury deal with this.

11:12 22 Is that clear?

11:12 23 MS. KIM: Yes, Your Honor.

11:12 24 THE COURT: Yes, ma'am.

11:12 25 MS. MOYE: Your Honor, if I could be

11:12 1 heard on this. I think --

11:12 2 THE COURT: No. I don't think I need to  
11:12 3 hear anything else.

11:12 4 MS. MOYE: Okay.

11:12 5 THE COURT: Thank you very much. We'll  
11:12 6 be back in a few minutes.

11:12 7 (Recess taken.)

11:22 8 THE BAILIFF: All rise.

11:22 9 THE COURT: Please remain standing for  
11:22 10 the jury.

11:22 11 (Jury entered the courtroom.)

11:23 12 THE COURT: Thank you. You may be  
11:23 13 seated.

11:23 14 I talked to the jury and they would like  
11:23 15 to go for about another hour, so that's what we'll do  
11:23 16 before we break for lunch.

11:23 17 THE WITNESS: Thank you, sir.

11:23 18 BY MS. KIM:

11:23 19 Q. Hello again, Mr. Etchegoyen.

11:23 20 A. Hello.

11:23 21 Q. Is this on?

11:23 22 A. I can hear you.

11:23 23 Q. So we talked before the break about several  
11:23 24 companies that you started and sold. Now I want to  
11:23 25 talk to you about Brazos and why you started it.

11:23 1 Could you please tell us why you started  
11:23 2 Brazos?

11:23 3 A. Sure. I wanted to take what I'd learned about  
11:23 4 kind of incubating technologies at the former company  
11:24 5 and -- but start with a -- start with a much -- a much  
11:24 6 better kind of patent portfolio and invention catalog.

11:24 7 I always looked up to -- as an inventor, you  
11:24 8 end up doing searches and stuff. And I always looked  
11:24 9 up to -- I always looked up to the inventors at  
11:24 10 obviously Bell Labs, like, and Alcatel-Lucent. Most  
11:24 11 inventors do.

11:24 12 They -- you know, you see those names, and  
11:24 13 it's rare that -- it's rare that any group of humans  
11:24 14 have nine Nobel Prizes, you know. I didn't have  
11:24 15 anything like that. So I was -- I thought that that  
11:24 16 would be a good foundation to incubate companies, have  
11:24 17 a licensing group and also incubate companies as well  
11:24 18 and bring on inventors and new technologies.

11:24 19 Q. When you say "incubate," what do you mean by  
11:24 20 that?

11:24 21 A. I mean, eventually when we have -- when we  
11:25 22 have more money, we can -- we're -- we plan on bringing  
11:25 23 in like even local inventors, you know. We've been  
11:25 24 working a little bit with Baylor. It's early. But  
11:25 25 bringing on young, new -- young, new inventors and



11:25 1 create companies like I had done in the past. It's  
11:25 2 exciting.

11:25 3 Q. And I think you were referring to, as an  
11:25 4 inventor, you looked up to the Bell Labs and  
11:25 5 Alcatel-Lucent patents. We were all here when  
11:25 6 Mr. Waldrop and Mr. Rosenthal talked about those  
11:25 7 patents.

11:25 8 Could you tell us about why those patents were  
11:25 9 something noteworthy for you?

11:25 10 A. Yeah. It's -- I mean, the patents are kind of  
11:25 11 well-known as kind of one of the, you know, most, kind  
11:25 12 of, unlicensed portfolios of value in the market.

11:25 13 You know, I think -- I saw a slide, I think it  
11:26 14 said 8,000. I don't think -- I think it's 12,000,  
11:26 15 closer to 12,000 worldwide patents.

11:26 16 And it was, you know, it's a significant  
11:26 17 patent portfolio, significant provenance of inventors  
11:26 18 and invention, and it was a great -- is and was a great  
11:26 19 foundation to start.

11:26 20 We've been doing it for, what, six years. So  
11:26 21 it's been -- it's been, you know, gone on for awhile,  
11:26 22 but I hope we can continue to grow it.

11:26 23 Q. I think you just told us about how it's -- the  
11:26 24 value of it is -- it's because it's unlicensed.

11:26 25 Can you please tell us what you meant by that?

11:26 1 A. Sure. I mean, companies like IBM, Broadcom,  
11:26 2 other companies kind of, you know, that, I mean, Nokia  
11:26 3 as well is a great -- is a great, great company. But  
11:26 4 IBM and others -- I'm not picking on IBM. They're a  
11:27 5 fantastic company. They did a lot for me. I love  
11:27 6 them.

11:27 7 But they -- they tend to license out their  
11:27 8 entire portfolio to companies, you know, in broad  
11:27 9 licensing. So it's hard to create new products and new  
11:27 10 licensing because then you're kind of competing with  
11:27 11 yourself because the technology's already been licensed  
11:27 12 out.

11:27 13 Bell Labs, Alcatel-Lucent, Nokia are pretty  
11:27 14 famous for not -- for not doing that. They -- and  
11:27 15 they -- and they do enforce. I mean, that was the  
11:27 16 other thing. I mean, Alcatel-Lucent and Nokia were,  
11:27 17 you know, strong about enforcing their portfolio and  
11:27 18 their inventions and they protect their inventors.  
11:27 19 That's unique.

11:27 20 I mean, they pay their inventors very, very  
11:27 21 well, which is fantastic. It was just -- they just --  
11:28 22 they just do it -- they do it right in my opinion.

11:28 23 Q. And the patents we're talking about today  
11:28 24 that, I think, both Mr. Waldrop and Mr. Rosenthal had  
11:28 25 on slides, the -- I think it's the '133, the '800 and

11:28 1 the '360 patents, were they included as part of the 8  
11:28 2 or 12,000 patents we were talking about?

11:28 3 A. Yes, ma'am.

11:28 4 Q. And you were here on Thursday when our jury  
11:28 5 was selected and also earlier this morning. I saw you  
11:28 6 here with my own eyes.

11:28 7 And I believe counsel for VMware, Ms. Moye and  
11:28 8 Mr. Rosenthal, have both said that are -- the  
11:28 9 technology's very old, that it's 20 years old.

11:28 10 Do you remember that?

11:28 11 A. I do. Yeah.

11:28 12 Q. Do you agree with that?

11:28 13 A. No. No. In a way, that's -- I mean, cloud  
11:28 14 computing is still at its infancy. I mean, Amazon  
11:28 15 licensed this -- our patents. And Amazon's a leader in  
11:28 16 cloud computing. I mean, they are the cloud.

11:28 17 So I think that's -- I think that's really  
11:29 18 false. I think that's kind of "if you can't convince,  
11:29 19 confuse" terminology.

11:29 20 I think that, you know, when, you know,  
11:29 21 depending on how great a patent is and how  
11:29 22 forward-thinking, I mean, being an inventor is about  
11:29 23 being forward-thinking. It's about coming up with  
11:29 24 something sometimes years before anyone else does and  
11:29 25 then the market catches up with that.

11:29 1 I mean, the telephone was invented long before  
11:29 2 the market adopted it, so even way back then.

11:29 3 So it's -- no. I mean -- and it's the core.  
11:29 4 I mean, cloud -- cloud is really, really important. So  
11:29 5 yeah. I don't agree with that. I mean, no offense. I  
11:29 6 don't.

11:29 7 Q. Sure.

11:29 8 I want to go back and talk about the patents  
11:29 9 that you purchased from Nokia, which came from  
11:29 10 Alcatel-Lucent and also Bell Labs.

11:29 11 8,000 or 12,000, that sounds like a lot of  
11:29 12 patents. It sounds like a significant amount of  
11:29 13 patents to Nokia. About what percentage of Nokia's  
11:30 14 patents did that make up?

11:30 15 A. I don't know -- I don't know what it is today,  
11:30 16 but I think then it was roughly a third of their --  
11:30 17 what they call their licensable portfolio.

11:30 18 Q. So a third is -- that's a big chunk. If I was  
11:30 19 a third shorter, a third taller, I'd be either giant or  
11:30 20 really, really small.

11:30 21 Why would -- what's your understanding of why  
11:30 22 Nokia would sell a third of their patents to you and  
11:30 23 Brazos?

11:30 24 A. I wish I was a third taller.

11:30 25 So they -- so, again, they enforce -- Nokia

11:30 1 spent billions of dollars upgrading technology and  
11:30 2 patents, and they did enforce. They have -- like I  
11:30 3 said before, they have a history of enforcing --

11:30 4 Q. When you say "enforce," what does that mean?

11:30 5 A. Litigating their patent rights for what  
11:31 6 they -- for what they invented. They -- so -- and they  
11:31 7 were -- they were going after Apple at that time as  
11:31 8 well, right before we acquired the portfolio.

11:31 9 But they tend to, you know, they enforce their  
11:31 10 patents. And, ultimately, they can't do all of it.

11:31 11 So, historically speaking, I mean, Uniloc  
11:31 12 was -- that team was -- unfortunately, we had to  
11:31 13 litigate a lot to protect my inventions and my  
11:31 14 products.

11:31 15 So it -- they -- they kind of sought out the  
11:31 16 team to say, hey, you know, would you be willing to,  
11:31 17 you know, acquire these assets and partner and help us  
11:31 18 license our inventions?

11:31 19 Q. And you ended up partnering with Nokia?

11:31 20 A. Yes.

11:31 21 Q. I want to talk a little bit about that deal.

11:31 22 What did Nokia, other than getting to partner  
11:32 23 with you, what did they get out of it?

11:32 24 A. They -- at that time, they received a  
11:32 25 percentage of all the money. So how it worked is they

11:32 1 collect -- you know, we pay. We pay upfront, but we  
11:32 2 also collect licensing revenue for companies that pay,  
11:32 3 like, you know, like Amazon and Microsoft and others.

11:32 4 And then we -- and then they get a percentage  
11:32 5 of that. And then they distribute that back to their,  
11:32 6 you know, to pay their inventors that still work there  
11:32 7 and all of that.

11:32 8 Q. What was that percentage?

11:32 9 A. I'm sorry. There were two different ones.  
11:32 10 But I think it was 10 -- one was -- one grouping of  
11:32 11 patents was 10 percent, and the other was I think  
11:32 12 32 percent. Later it was -- later, because I'm simple,  
11:32 13 we blended it to 20 -- I think it was 20 percent after  
11:33 14 blending all the portfolios.

11:33 15 Q. Was VMware or Dell ever provided a chance to  
11:33 16 license Brazos' patents?

11:33 17 A. Yes.

11:33 18 Q. Why do you believe that?

11:33 19 A. I found out later that they were. I don't  
11:33 20 know how long after they were offered. A broker -- we  
11:33 21 were -- Brazos was -- we took a stance for several  
11:33 22 years to -- to like, you know, we didn't want to  
11:33 23 litigate at all.

11:33 24 So we were trying -- we had brokers that did  
11:33 25 friendly, you know, friendly non-litigation licensing.

11:33 1 Hey. Our stuff is great. You know, please license it.  
11:33 2 You know, it's making a difference in the world.  
11:33 3 I've -- license it. And we don't want to litigate.

11:33 4 So we had brokers that did that, that did  
11:33 5 non-litigation licensing.

11:33 6 Q. And you're aware that one of your brokers, I  
11:33 7 think Mr. Rosenthal mentioned it a little earlier this  
11:34 8 morning, that they had made an offer of the 2.5  
11:34 9 million.

11:34 10 Are you aware of that?

11:34 11 A. Yes. I found out -- I found out later. Maybe  
11:34 12 years later after the offer was made.

11:34 13 Q. And you're aware that that was done before you  
11:34 14 brought this lawsuit against VMware and Dell?

11:34 15 A. Yes. Yes, of course.

11:34 16 Q. Were you willing to license the patents to  
11:34 17 Dell and VMware before you brought this lawsuit?

11:34 18 A. I'm always -- I've done hundreds of licensing  
11:34 19 transactions. I'm always willing to license. I would  
11:34 20 prefer -- I would prefer not to do lawsuits.

11:34 21 Q. Had VMware chosen to take a license to Brazos'  
11:34 22 patents, would you be here today?

11:34 23 A. No.

11:34 24 Q. Thank you, Mr. Etchegoyen.

11:34 25 MS. KIM: I pass the witness.

11:34 1 MS. MOYE: Your Honor, if we could  
11:34 2 approach quickly, I just have a couple of issues before  
11:35 3 I start cross-examination.

11:35 4 THE COURT: Okay.

11:35 5 (Bench conference.)

11:35 6 MS. MOYE: Just two things I wanted to  
11:35 7 explore, Your Honor, to make sure we don't cross any  
11:35 8 lines. One, I know there was motion in limine practice  
11:35 9 on Brazos and its Texas presence versus other presence.

11:35 10 And I believe that in the first sentence  
11:35 11 of his opening statement that plaintiff's counsel has  
11:35 12 opened the door for us to cross-examine this witness  
11:35 13 about the fact that it was originally a Delaware  
11:35 14 corporation and only became -- had a Texas presence a  
11:35 15 few months before the filing of this lawsuit. The  
11:35 16 first words out of his mouth are: We were a Texas  
11:36 17 company.

11:36 18 THE COURT: I heard.

11:36 19 MS. MOYE: Okay.

11:36 20 THE COURT: Counsel?

11:36 21 MS. KIM: The MIL, I think, was pretty  
11:36 22 clear. Actually, do I have it? I don't have it here  
11:36 23 with me. But it had to do with the reason for being  
11:36 24 here would be not to disparage the other side. For  
11:36 25 example, us opening here because we want a Waco



11:36 1 presence and things like that. I think him saying that  
11:36 2 we are --

11:36 3 THE COURT: You made that --

11:36 4 MS. KIM: -- a Texas company --

11:36 5 THE COURT: You made them sound like they  
11:36 6 were a Texas company.

11:36 7 I'll allow you to get -- to give some  
11:36 8 background about the fact that they're from Delaware.

11:36 9 MS. MOYE: Thank you.

11:36 10 THE COURT: Anything else?

11:36 11 MS. MOYE: Yes. Your Honor, on the  
11:36 12 question of other litigation, I know there was a motion  
11:36 13 in limine that dealt with patent proceedings. I don't  
11:36 14 think there was anything on other litigation.

11:36 15 But this witness has now testified at  
11:36 16 length and repeatedly about other litigation. And I  
11:36 17 think given that, we're entitled to explore his other  
11:36 18 litigation related to this patent portfolio. He's  
11:36 19 filed over 140 lawsuits. Just told the jury that this  
11:37 20 is my first time doing this. Has, in fact, been  
11:37 21 deposed 20 times.

11:37 22 THE COURT: Counsel?

11:37 23 MS. MOYE: I think this is wide open.

11:37 24 MS. KIM: I think the number of lawsuits  
11:37 25 would be highly prejudicial and not add anything. He'd

11:37 1 had about -- he talked about lawsuits before.

11:37 2 THE COURT: He talked about having to go  
11:37 3 to trial and take on Microsoft. He's opened the door.  
11:37 4 I don't want this to devolve into a bunch of other  
11:37 5 stuff.

11:37 6 But you can get in -- you can -- you can  
11:37 7 go into cross to show that he did not get the full  
11:37 8 picture of the success that he's had with these patents  
11:37 9 in prior litigations. I don't want you to talk about  
11:37 10 how much litigation there's been. I don't think that's  
11:37 11 particularly relevant.

11:37 12 But he did give the impression -- I got  
11:37 13 the impression that there's just been one case against  
11:37 14 Microsoft and everyone else has taken a license. And  
11:37 15 you're free to correct that in your cross.

11:37 16 MS. MOYE: Thank you, Your Honor.

11:37 17 MS. KIM: Your Honor, for clarification,  
11:38 18 does that mean just Brazos' lawsuits that have been  
11:38 19 filed and settled? Or is it total? If we're talking  
11:38 20 about how successful he's been --

11:38 21 THE COURT: On these patents.

11:38 22 MS. KIM: On these patents, these three  
11:38 23 patents. Right.

11:38 24 MS. MOYE: That's all I intend to do, is  
11:38 25 ask him --

11:38 1 THE COURT: It's limited to these three  
11:38 2 patents.

11:38 3 MS. KIM: These three patents only.

11:38 4 Thank you, Your Honor.

01:36 5 (Bench conference concludes.)

11:38 6 MR. MCCracken: Your Honor, may I

11:38 7 approach with some binders?

11:38 8 THE COURT: Of course. Thank you for  
11:38 9 asking.

11:38 10 CROSS-EXAMINATION

11:38 11 BY MS. MOYE:

11:38 12 Q. Good morning, Mr. Etchegoyen.

11:38 13 A. Good morning.

11:38 14 Q. We have not met before. I am Veronica Moye.  
11:38 15 I represent the defendants. And I will be doing your  
11:38 16 cross-examination today.

11:38 17 Can you hear me fine, sir?

11:38 18 A. I can hear you fine, ma'am.

11:38 19 Q. Thank you.

11:38 20 And I'd like us to get through this  
11:39 21 examination as quickly and efficiently as possible. So  
11:39 22 I'd ask that listen to my questions and try to respond  
11:39 23 directly to them.

11:39 24 Can you do that, sir?

11:39 25 A. Yes, ma'am.

11:39 1 Q. Thank you.

11:39 2 Now, Mr. Etchegoyen, you explained that you  
11:39 3 are currently the chairman and CEO of the plaintiff  
11:39 4 WSOU, right?

11:39 5 A. I think I said chairman and founder.

11:39 6 Q. Are you not also currently the CEO, sir, of  
11:39 7 WSOU?

11:39 8 A. I haven't seen that title, but that's fine,  
11:39 9 yeah. I can be the CEO.

11:39 10 Q. You are the CEO.

11:39 11 And you, Mr. Etchegoyen, you personally will  
11:39 12 receive a percentage of any money generated by WSOU's  
11:39 13 efforts to license its patents, correct?

11:39 14 A. Yes. Eventually.

11:39 15 Q. And if this jury awards WSOU money, you will  
11:40 16 receive a percentage of what is collected; isn't that  
11:40 17 right, sir?

11:40 18 A. I don't think if the jury awards \$81 million  
11:40 19 that I would receive money, no.

11:40 20 Q. Okay. Mr. Etchegoyen, do you remember being  
11:40 21 deposed in this case?

11:40 22 A. Yes, ma'am.

11:40 23 Q. And you were under oath when you were deposed  
11:40 24 just as you're under oath now; isn't that correct, sir?

11:40 25 A. Yes, ma'am.

11:40 1 Q. And so you told the truth in that deposition,  
11:40 2 didn't you?

11:40 3 A. Yes.

11:40 4 Q. Okay. You should have in front of you a copy  
11:40 5 of your deposition transcript. And I refer you to Page  
11:40 6 119, Lines 8 through 19.

11:40 7 A. I'm sorry. Which tab? Sorry.

11:40 8 MS. MOYE: May I approach, Your Honor,  
11:41 9 and help the witness?

11:41 10 A. Oh, I think I got it. The first tab. Sorry.

11:41 11 MS. MOYE: Deposition transcript.

11:41 12 A. Oh, okay.

11:41 13 (Off-the-record discussion.)

11:41 14 MS. MOYE: And could I have, Mr. Eaton,  
11:41 15 Mr. Etchegoyen's deposition testimony starting at Page  
11:41 16 119, Lines 8 through 19?

11:41 17 (Video played.)

11:41 18 Q. So you understand that in the event that a  
11:41 19 jury does award money damages, and that award is upheld  
11:41 20 and paid, that that would become revenue of WSOU,  
11:41 21 correct?

11:41 22 A. Yes. I would agree. If -- on the moneys  
11:41 23 paid, I would receive some calculation based on that.

11:41 24 Q. And the higher the jury award, the more you  
11:42 25 get paid?

11:42 1 A. Yeah. I think that's -- yeah. I think that's  
11:42 2 reasonable to assume.

11:42 3 (End video.)

11:42 4 BY MS. MOYE:

11:42 5 Q. Mr. Etchegoyen, is it not true that the higher  
11:42 6 the jury award in this case, the more you will get  
11:42 7 paid?

11:42 8 A. I -- eventually I will -- I will get paid when  
11:42 9 there's a certain --

11:42 10 Q. Is that a yes, Mr. Etchegoyen?

11:42 11 THE COURT: Counsel, you need to let him  
11:42 12 answer the question. And if I don't think he's  
11:42 13 responding directly, I will take care of it.

11:42 14 MS. MOYE: Understood, Your Honor.

11:42 15 A. I think I understood the question.

11:42 16 THE COURT: Would you all like to hear  
11:42 17 the question again?

11:42 18 A. I would, please.

11:42 19 BY MS. MOYE:

11:42 20 Q. I'm happy to repeat it.

11:42 21 A. Thank you.

11:42 22 Q. Is it not true, Mr. Etchegoyen, that the more  
11:42 23 the jury awards, the more you will ultimately receive?

11:42 24 A. If the jury awards the 81 million maximum, I  
11:43 25 won't -- we've spent -- with the amount we've spent, I

11:43 1 won't -- I won't receive -- I don't think I receive  
11:43 2 anything yet. Because there's a threshold.

11:43 3 Q. Mr. Etchegoyen, I didn't ask you about 81  
11:43 4 million.

11:43 5 A. Okay.

11:43 6 Q. So let me try again. Is it not true, sir,  
11:43 7 that the more the jury awards, the more you will  
11:43 8 receive?

11:43 9 A. Eventually I will receive financial  
11:43 10 remuneration, yes.

11:43 11 Q. Okay.

11:43 12 MS. MOYE: Can we just have  
11:43 13 Mr. Etchegoyen's sworn deposition testimony again?  
11:43 14 This is at 119, 8 through 19.

11:43 15 (Video played.)

11:43 16 Q. So you understand that in the event that a  
11:43 17 jury does award money damages and that award is upheld  
11:43 18 and paid, that that would become revenue of WSOU,  
11:43 19 correct?

11:43 20 A. Yes. I would agree. On the moneys paid I  
11:44 21 would receive some calculation based on that.

11:44 22 Q. And the higher the jury award, the more you  
11:44 23 get paid?

11:44 24 A. Yeah. I think that's -- yeah. I think that's  
11:44 25 reasonable to assume.

11:44 1 (End video.)

11:44 2 BY MS. MOYE:

11:44 3 Q. And that's your sworn deposition testimony,  
11:44 4 correct, Mr. Etchegoyen?

11:44 5 A. Yes, ma'am.

11:44 6 Q. That's you on the video?

11:44 7 A. Yes. That's me.

11:44 8 Q. Now, I've been using WSOU. During your  
11:44 9 testimony you used the term Brazos. Those are, in  
11:44 10 fact, the same companies; is that correct?

11:44 11 A. Brazos and WSOU are the same company.

11:44 12 Q. Right. So WSOU is the company's name. Brazos  
11:44 13 is the DBA, a doing business as; is that correct?

11:44 14 A. I don't know the legal term, but it's  
11:44 15 pronounced Brazos and I believe that's -- I think it's  
11:44 16 a DBA, yeah. It's part of WSOU.

11:44 17 Q. Now, WSOU is seeking over 80 million in  
11:45 18 damages, right? You've confirmed that?

11:45 19 A. Yes.

11:45 20 Q. And that's the award that WSOU is seeking for  
11:45 21 claimed infringement of three patents, correct?

11:45 22 A. No, ma'am. It's two patents. The one is --

23 Q. Two patents.

11:45 24 A. -- we're waiting till after. And then we have  
11:45 25 another trial on the damages, I believe.



11:45 1 Q. You are correct on that. Two patents --

11:45 2 THE COURT: Ladies and gentlemen of the  
11:45 3 jury, we're going to take a recess. We're going to go  
11:45 4 ahead and take a recess now for lunch. It's 11:45. If  
11:45 5 you all would be back at 1:00, that would be great.

11:45 6 THE BAILIFF: All rise.

11:45 7 (Jury exited the courtroom.)

11:45 8 THE COURT: You may step down.

9 THE WITNESS: Yes, sir.

11:46 10 THE COURT: I have not decided anything  
11:46 11 about another trial. I didn't say that. I don't know  
11:46 12 how to fix this now with the jury. I'll think about it  
11:46 13 over lunch.

11:46 14 Counsel, if this witness can't answer the  
11:46 15 questions directly and injects -- I don't even really  
11:46 16 know what to say about what to do right now. He was  
11:46 17 here for the entire discussion this morning.

11:47 18 But I will find -- I'll figure something  
11:47 19 out to say to the jury. If this happens again with any  
11:47 20 witness, I will correct it and the witness -- well, I  
11:47 21 don't know what to do. He's on cross. I can't deny  
11:47 22 you your cross.

11:47 23 But advise your fact witnesses that they  
11:47 24 are limited to the facts and answer the questions that  
11:47 25 are asked. And if they don't, I won't take another

11:47 1 break with the jury. I will handle it with the jury in  
11:47 2 here. And whosever witness it is, I guarantee you will  
11:47 3 be unhappy about what I have to do to make it fair for  
11:47 4 the other side because of what a witness has said.

11:48 5 I don't know how I can be any more clear  
11:48 6 than that. Talk to your witnesses. Tell them to  
11:48 7 answer the questions. I will see you back at 1:00.

11:48 8 THE BAILIFF: All rise.

11:48 9 (Recess taken.)

01:01 10 THE BAILIFF: All rise.

01:01 11 THE COURT: Thank you. You may be  
01:01 12 seated.

01:01 13 My understanding is there are issues to  
01:01 14 be taken up. And I will remind you, Mr. Shelton and  
01:01 15 everyone, that you all are on the clock and the loser  
01:01 16 will have the time used to their bank account.

01:02 17 MR. SHELTON: Thank you, Your Honor.

01:02 18 Your Honor, we spent the lunch break  
01:02 19 preparing a proposed curative instruction for the  
01:02 20 several references to either a second trial on damages  
01:02 21 for the '800 or another proceeding after this trial, of  
01:02 22 course, which are incorrect.

01:02 23 And I can either -- I have copies  
01:02 24 prepared for Your Honor and for the plaintiff.

01:02 25 THE COURT: Okay.

01:02 1 MR. SHELTON: And, Your Honor, of course,  
01:02 2 I don't need to explain this to you, but two things  
01:02 3 have happened this morning, both of which are quite  
01:02 4 troubling.

01:02 5 The first is that there's been an undue  
01:02 6 emphasis on damages, putting the damages cart before  
01:02 7 the liability horse, which of course is problematic in  
01:02 8 front of the jury.

01:02 9 And the second is that there have been  
01:02 10 these incorrect references to another proceeding after  
01:02 11 this trial in which damages on the '800 patent, if  
01:02 12 liability was found, would be determined.

01:02 13 And as Your Honor put it aptly, you have  
01:03 14 not made that decision yet.

01:03 15 Would you prefer that I read this  
01:03 16 proposed instruction in the record?

01:03 17 THE COURT: I'll read it, and then you  
01:03 18 can just mark it as an exhibit.

01:03 19 MR. SHELTON: Very good. Thank you, Your  
01:03 20 Honor.

01:03 21 THE COURT: Okay. Mr. Shelton, I've read  
01:04 22 this. Let me hear from the plaintiff what they think  
01:04 23 of this.

01:04 24 You don't need to argue to me -- let me  
01:04 25 start over. You do not need to argue to me the final

01:04 1 sentence of the second paragraph. I would not give  
01:04 2 that sentence, but if you want to tell me what you feel  
01:04 3 about the rest of it.

01:04 4 MR. WALDROP: Thank you, Your Honor. I  
01:04 5 appreciate that. Thank you again, Your Honor.

01:04 6 I think that the only part, Your Honor --  
01:04 7 well, I hate to be in this situation, Your Honor, but  
01:04 8 not only the last sentence but the part about "even  
01:04 9 though the plaintiff has the burden of proof," Your  
01:05 10 Honor, after the '800 patent in the middle of the  
01:05 11 second paragraph.

01:05 12 THE COURT: I see it. But that  
01:05 13 statement's correct, is it not?

01:05 14 They're not going to hear evidence --  
01:05 15 tell me what's incorrect about this statement: You  
01:05 16 will not hear evidence from the plaintiff in this trial  
01:05 17 regarding damages on the '800 patent even though the  
01:05 18 plaintiff has the burden of proof, and I would add, on  
01:05 19 this issue.

01:05 20 What is incorrect about that statement?

01:05 21 MR. WALDROP: Because the sentence by  
01:05 22 itself assumes that we didn't meet the burden. We  
01:05 23 don't have a burden of damages in this case, Your  
01:05 24 Honor.

01:05 25 THE COURT: Yes, you do. You have the

01:05 1 burden of proof on the amount of damages.

01:05 2 MR. WALDROP: But we're not putting on --  
01:05 3 there's no damages case -- I understand. Yeah. That's  
01:05 4 the only thing I'm concerned about. I mean, the  
01:05 5 context of it, Your Honor, you know what I'm saying,  
01:05 6 Your Honor.

01:05 7 THE COURT: No. I understand. But I'm  
01:05 8 saying, but you -- it's correct your client or witness,  
01:05 9 a witness you called, injected this issue.

01:06 10 And -- but it is a fact that the jury  
01:06 11 will not hear evidence from the plaintiff in this trial  
01:06 12 regarding damages on the '800 patent. That's correct,  
01:06 13 right?

01:06 14 That's so far --

01:06 15 MR. WALDROP: Yes, Your Honor. So I'll  
01:06 16 state this, Your Honor, before I get in -- Your Honor,  
01:06 17 we object to the curative instruction just in general,  
01:06 18 Your Honor. So I would oppose the --

01:06 19 THE COURT: Okay. That's fine.

01:06 20 But let me try again: You will not hear  
01:06 21 evidence from the plaintiff in this trial regarding  
01:06 22 damages on the '800 patent.

01:06 23 That is a true statement, right?

01:06 24 MR. WALDROP: Yes.

01:06 25 THE COURT: And it's the --

01:06 1 MR. WALDROP: Period.

01:06 2 THE COURT: And it's the plaintiff that  
01:06 3 has the burden of proof on the amount of damages -- of  
01:06 4 proving the damages.

01:06 5 MR. WALDROP: Yes, Your Honor. But I  
01:06 6 don't even know why you have to inject -- Your Honor, I  
01:06 7 would object to that.

01:06 8 THE COURT: I understand, but --

01:06 9 MR. WALDROP: It doesn't make any sense  
01:06 10 because we're not presenting a damages case. So it  
01:06 11 almost suggests that --

01:06 12 THE COURT: But if I -- if I ask them,  
01:07 13 and I very well might, ask them to answer a damages  
01:07 14 question, the defendant certainly would have the right  
01:07 15 in closing argument, because it's going to be in my  
01:07 16 charge to say, ladies and gentlemen of the jury, on all  
01:07 17 three patents, the plaintiff has the burden of proving  
01:07 18 the appropriate amount of damages.

01:07 19 And there is going to be no evidence.  
01:07 20 And they're likely to hear this instruction -- this  
01:07 21 part of the instruction now and then because what else  
01:07 22 do we do?

01:07 23 You all have made the decision to move  
01:07 24 forward with the '800 patent even though you don't have  
01:07 25 a damages case. You don't have any evidence to put on.

01:07 1 That's fine. It's your choice.

01:07 2 But you're also going to have to reap the  
01:07 3 problems that that causes because I have to make sure  
01:07 4 the jury understands what is happening.

01:08 5 And it's a fact that there will be -- I'm  
01:08 6 deleting what I think -- I'll say it, I think this is  
01:08 7 impermissible. Defendant asked me to say: I did not  
01:08 8 permit the plaintiff to present evidence regarding  
01:08 9 damages for the '800 patent because it's not reliable.

01:08 10 I don't think that needs to be in there.  
01:08 11 I think -- but everything else is, in my opinion,  
01:08 12 exactly what the law is and what the -- what's going to  
01:08 13 happen in the trial.

01:08 14 MR. WALDROP: Your Honor, I understand,  
01:08 15 Your Honor. We object, Your Honor.

01:08 16 But there's one question, Your Honor,  
01:08 17 that may circumvent all of this, Your Honor, which you  
01:08 18 kind of hinted at, Your Honor, which may lead to a  
01:08 19 reduction in time for the entire proceeding, Your  
01:08 20 Honor, and I'm mindful of the Court's time and very  
01:08 21 thankful for this opportunity, Your Honor.

01:08 22 Look, Your Honor. We only -- if there's  
01:08 23 one question or two questions that we cannot ask based  
01:08 24 on the Court's rulings this morning, then we may be in  
01:08 25 a situation, Your Honor -- and depending on what the

01:09 1 Court says, that may obviate the need for all of this.

01:09 2 So I wanted to raise that with Your Honor  
01:09 3 because that may put all this aside, if I could.

01:09 4 If we can't -- if we cannot ask, Your  
01:09 5 Honor, our expert, and this is the particular question,  
01:09 6 just this question alone: Does VMware offer hardware  
01:09 7 and software in connection with its vSphere 6.5  
01:09 8 product? Is that question permissible or not?

01:09 9 THE COURT: What is the defendants'  
01:09 10 position?

01:09 11 MR. ROSENTHAL: Your Honor, our position  
01:09 12 is that's exactly what was ruled on today. There is no  
01:09 13 hardware.

01:09 14 THE COURT: I thought so too.

01:09 15 Yeah. You are correct, Mr. Waldrop. I  
01:09 16 think that's been the subject of at least four  
01:09 17 hearings, maybe five hearings, that have been ruled on  
01:09 18 by this Court about that issue.

01:09 19 MR. WALDROP: So the only reason why I  
01:09 20 was asking, Your Honor, because -- and maybe it was  
01:09 21 wrong, Your Honor. I'm doing the very best I can. Our  
01:09 22 understanding was that the rulings applied to -- your  
01:09 23 ruling this morning applied to specific Dell hardware,  
01:10 24 not the existence of hardware.

01:10 25 If that's the case, Your Honor, I think



01:10 1 we're in a situation, Your Honor, given these rulings,  
01:10 2 and we would like to preserve for the record and, Your  
01:10 3 Honor, either move to continue or make every  
01:10 4 preservation of rights that we can as to the '800 and  
01:10 5 '360 patent, make offers of proof.

01:10 6 In an interest of time, we may not be  
01:10 7 able to do all of that now, but I would want to ask for  
01:10 8 preservation of all rights for appeal, Your Honor.

01:10 9 And then maybe make offers of proof after  
01:10 10 the jury leaves or however you want to do that, Your  
01:10 11 Honor. We weren't prepared to do that because we had a  
01:10 12 different understanding, but we are where we are, Your  
01:10 13 Honor.

01:10 14 And if that's the case, if that's where  
01:10 15 we are, Your Honor, because effectively we've been --  
01:10 16 effectively the case is over for us on the '360 patent  
01:10 17 and the '800 patent by operation of the rulings, Your  
01:10 18 Honor, as to almost summary judgment.

01:10 19 And I have no interest in wasting the  
01:11 20 Court's time. We'll just take this up in a different  
01:11 21 way, Your Honor. And we'll just proceed on the '133  
01:11 22 patent.

01:11 23 THE COURT: So what I hear you saying is  
01:11 24 you would want me to sever out two of the three patents  
01:11 25 and allow you to go up to the Circuit and appeal my

01:11 1 rulings with respect to the Daubert where I struck the  
01:11 2 damages and my rulings with respect to what is and is  
01:11 3 not admissible with respect to the hardware?

01:11 4 MR. WALDROP: They're already separate  
01:11 5 cases, Your Honor, I believe, consolidated for trial.

01:11 6 THE COURT: So you're asking me to grant  
01:11 7 the motion -- you would ask me to grant a motion from  
01:11 8 the defendant on those to dismiss them, which would  
01:11 9 make them appealable based on my rulings?

01:11 10 MR. WALDROP: Your Honor, there's a  
01:12 11 couple ways to do it, because we could also  
01:12 12 stipulate -- stipulations are also an issue.

01:12 13 Your Honor, if I could, because like I  
01:12 14 said, this was not something -- if I could have one  
01:12 15 minute, Your Honor.

01:12 16 THE COURT: You can have as much time as  
01:12 17 you need. This is on your clock.

01:12 18 MR. WALDROP: Okay. Well, my case shrank  
01:12 19 a lot, Your Honor. So I want to move fast.

01:12 20 THE COURT: Take your time.

01:12 21 MR. WALDROP: All right. Thank you, Your  
01:12 22 Honor. I just need a few seconds, Your Honor, a few  
01:12 23 minutes.

01:12 24 (Pause in proceedings.)

01:18 25 MR. ROSENTHAL: Your Honor, it's me.

01:18 1 Mr. Waldrop and I have just discussed how we think  
01:18 2 would be the appropriate way to proceed in this  
01:18 3 circumstance. And we think the appropriate way to  
01:18 4 proceed is for us to now make a motion and hear  
01:18 5 defendants -- or hear Plaintiff's response.

01:18 6 Our motion is under Rule 56 we move for  
01:18 7 judgment as a matter of law that there is no direct  
01:18 8 infringement of the '800 and '360 patents on the basis  
01:18 9 that those -- the only asserted claims of those two  
01:18 10 patents are apparatus claims. The only proffered  
01:18 11 evidence in this case that is consistent with the  
01:18 12 Court's rulings is that of direct sales of software  
01:18 13 alone. And that there is no proffered evidence under  
01:18 14 the Court's rulings of the sale of hardware. And as a  
01:18 15 result, there will be no evidence of infringement. And  
01:19 16 indirect infringement is out of the case.

01:19 17 We also move for the same basis for  
01:19 18 judgment as a matter of law that there are no damages  
01:19 19 for those two, or at least that the plaintiff cannot  
01:19 20 prove any damages for those two patents on the same  
01:19 21 basis, because the damages evidence that they have  
01:19 22 proffered in this case is tied entirely to the sale of  
01:19 23 software which cannot by law infringe apparatus claims.

01:19 24 THE COURT: And in addition to that, on  
01:19 25 the '800 the Daubert that I had already granted.

01:19 1 MR. ROSENTHAL: And on that basis as  
01:19 2 well, Your Honor.

01:19 3 THE COURT: Okay.

01:19 4 MR. ROSENTHAL: Thank you.

01:19 5 THE COURT: Yes, sir?

01:19 6 MR. WALDROP: Your Honor, for the record,  
01:19 7 we would oppose that motion, Your Honor. And we ask  
01:19 8 and state that by operation of law, Your Honor, and  
01:19 9 your rulings from this morning previously, that we  
01:19 10 cannot present a damages case and maybe an infringement  
01:19 11 case, Your Honor. And we ask that you enter in your  
01:19 12 findings of fact in this case, Your Honor.

01:19 13 THE COURT: A response?

01:20 14 MR. ROSENTHAL: Your Honor, I'm not sure  
01:20 15 how an opposition plays here. Either they're going to  
01:20 16 present the evidence --

01:20 17 THE COURT: That's what I think as well.

01:20 18 MR. ROSENTHAL: -- or they're not.

19 THE COURT: Right.

01:20 20 MR. ROSENTHAL: And if the answer is that  
01:20 21 they're not, then there is no basis to oppose. So we  
01:20 22 think it ought to be dismissed with prejudice.

01:20 23 THE COURT: What you have to put on the  
01:20 24 record, Counsel -- I understand you're opposing the  
01:20 25 motions. But if there's anything substantive with

01:20 1 which you disagree about what Counsel just said -- and  
01:20 2 I understand you blame the Court for it and that's  
01:20 3 fine, the rulings of the Court for the situation you're  
01:20 4 in.

01:20 5 But what I heard Mr. Rosenthal say, I  
01:20 6 think you've articulated very clearly on the record  
01:20 7 that given my rulings, both with respect to the  
01:20 8 hardware and with respect to the Daubert on just the  
01:21 9 '800, that a motion -- if my -- if my rulings were  
01:21 10 correct -- which Plaintiff disagrees with on the  
01:21 11 record -- but if my rulings were correct, then you are  
01:21 12 unable to put on evidence that would support a finding  
01:21 13 of infringement or damages on -- and I've already -- my  
01:21 14 brain's already gone -- on the '800 and the --

01:21 15 MR. ROSENTHAL: '360, Your Honor.

01:21 16 THE COURT: '360 patent.

01:21 17 Do you agree with that?

01:21 18 MR. WALDROP: Yes, Your Honor. We  
01:21 19 cannot.

01:21 20 THE COURT: Okay. Then I'm going to  
01:21 21 grant those motions. Which what I -- now, let me ask  
01:21 22 you all this.

01:21 23 And you can start, Mr. Waldrop, just  
01:21 24 because you're up.

01:21 25 I doubt the jury was dramatically

01:21 1 impacted by the statement that was made on the '800.  
01:21 2 But I'm sitting up here. I don't have -- I have no  
01:21 3 skin in the game.

01:21 4 But it seems to me that if we were -- if  
01:21 5 I were to instruct the jury when they came back in that  
01:22 6 we are now only going to hear evidence with respect to  
01:22 7 the...

01:22 8 MR. ROSENTHAL: '133, Your Honor.

01:22 9 THE COURT: 133 patent, and they should  
01:22 10 disregard anything -- any evidence that they heard with  
01:22 11 respect to either the '800 or the '360 patent -- I'm  
01:22 12 instructing them to disregard anything they've heard so  
01:22 13 far both with respect to in the opening argument, which  
01:22 14 is just argument, and any evidence that might have been  
01:22 15 put on during the opening for the first witness with  
01:22 16 regard to those two patents, and we're only going to  
01:22 17 deal with the '133, that's the way I would suggest we  
01:22 18 move forward.

01:22 19 I don't think I need to read a curative  
01:22 20 instruction on something that's not in here.

01:22 21 MR. ROSENTHAL: We agree, Your Honor.

01:22 22 THE COURT: Counsel?

01:22 23 MR. WALDROP: That's fine, Your Honor.

01:22 24 Thank you, Your Honor.

01:22 25 THE COURT: Okay. And then the final

01:22 1 thing we have, which makes me very happy, is you now  
01:22 2 have ten hours per side since there's only one  
01:22 3 patent --

01:22 4 MR. WALDROP: Thank you.

01:22 5 THE COURT: -- left in the case.

01:22 6 Now, Mr. Waldrop, you go first and then  
01:22 7 I'll hear from opposing counsel. Is there anything  
01:23 8 else we need to take up before I bring in the jury?

01:23 9 MR. WALDROP: There was an offer of  
01:23 10 proof, Your Honor, on just a -- and I'm not here to  
01:23 11 reargue claim construction, Your Honor. But there was  
01:23 12 an offer of proof we wanted to make on claim  
01:23 13 construction just to --

01:23 14 THE COURT: On claim construction?

01:23 15 MR. WALDROP: Yes, Your Honor. There was  
01:23 16 a denial -- we objected to some plain and ordinary  
01:23 17 meaning terms they used, Your Honor. In an effort to  
01:23 18 clarify, we offered to define what we meant by plain  
01:23 19 and ordinary meaning. The Court denied that, said it  
01:23 20 didn't want to take it up.

01:23 21 So we were going to state on the record,  
01:23 22 if the Court wanted, what Mr. -- Dr. McClellan, our  
01:23 23 witness, would say -- what we would say would be the  
01:23 24 constructions that the Court should have entered to  
01:23 25 resolve any 02 Micro disputes, Your Honor.

01:23 1 THE COURT: Okay. What we're going to do  
01:23 2 is we're going to get -- who -- what witness comes  
01:23 3 after this gentleman?

01:23 4 MR. WALDROP: Our infringement expert,  
01:23 5 Dr. McClellan.

01:23 6 THE COURT: Let's -- the jury's been  
01:23 7 waiting 20 minutes more. Let's finish this gentleman.  
01:23 8 We'll take a break and I'll take up that issue. And  
01:23 9 your expert is prepared to move forward?

01:24 10 MR. WALDROP: Yes, sir. Yes, sir.

01:24 11 THE COURT: Okay.

01:24 12 MR. ROSENTHAL: And, Your Honor, that's  
01:24 13 fine with us. We do have some demonstrative issues  
01:24 14 with his testimony, even on the '133. But I'm happy to  
01:24 15 take those up after this break.

01:24 16 THE COURT: Okay. Okay. I'll -- I'm  
01:24 17 just going to go back. And give me two minutes. We're  
01:24 18 going to round up the jury. We'll bring them back in.

01:24 19 THE BAILIFF: All rise.

01:24 20 (Recess taken.)

01:25 21 THE BAILIFF: All rise.

01:25 22 THE COURT: Please remain standing for  
01:25 23 the jury.

01:25 24 (Jury entered the courtroom.)

01:25 25 THE COURT: Thank you. You may be



01:25 1 seated.

01:25 2 Ladies and gentlemen of the jury, the  
01:26 3 greatest asset you will have as jurors is patience.  
01:26 4 But I wanted you to know that -- so you all are here to  
01:26 5 serve as the judges of the facts. You all are going to  
01:26 6 hear the evidence, answer questions at the end and come  
01:26 7 back with a verdict. Because you're the judges of the  
01:26 8 facts.

01:26 9 However, there are always issues of law  
01:26 10 that have to be dealt with. And that's why I'm here.  
01:26 11 And over the course of the -- while you were all  
01:26 12 patiently waiting, the lawyers and I took some things  
01:26 13 under consideration and we've determined -- I've  
01:27 14 determined that the '800 patent and the '360 patent no  
01:27 15 longer need to be in the case. Meaning we are down to  
01:27 16 one patent, the '133 patent.

01:27 17 I got that right, correct?

01:27 18 Very good.

01:27 19 So your time was not wasted by sitting  
01:27 20 back there. We were out here dealing with the law.  
01:27 21 The fact that those two patents are no longer in the  
01:27 22 case should have no impact on any -- your decision with  
01:27 23 the remaining '133 patent.

01:27 24 It has -- all these patents are asserted  
01:27 25 individually and separately. And so you shouldn't

01:27 1 concern yourself with why those patents are not in the  
01:27 2 case. And it should have no impact on any of your  
01:27 3 deliberations on the '133.

01:27 4 But let me wrap up by saying this: I  
01:27 5 didn't hear much testimony that concerned either the  
01:28 6 '800 or '360 patent with the first witness. But if  
01:28 7 there was any -- I don't remember much, if any -- you  
01:28 8 must disregard it because they're no longer in the  
01:28 9 case. To the extent that the lawyers, during their  
01:28 10 opening arguments, discussed those patents, you should  
01:28 11 just forget about -- it's no longer relevant.

01:28 12 So having said all that, Counsel, if you  
01:28 13 would ask your witness to get back on the witness  
01:28 14 stand, please.

01:28 15 BY MS. MOYE:

01:28 16 Q. Good afternoon, Mr. Etchegoyen. Are you ready  
01:28 17 to proceed?

01:28 18 A. Yes, ma'am.

01:28 19 Q. Now, Mr. Etchegoyen, it is true that you have  
01:28 20 already made millions of dollars personally from WSOU's  
01:29 21 licensing efforts? Is that right?

01:29 22 A. No.

01:29 23 Q. Okay. Let's look at your sworn deposition  
01:29 24 testimony on this point. Deposition at Page 115, Line  
01:29 25 2 to Line 16.

01:29 1 (Video played.)

01:29 2 Q. Have you received \$5 million, \$10 million,  
01:29 3 something less than that? Can you give me any goal  
01:29 4 posts around how much you received?

01:29 5 A. I'm not comfortable personally speculating  
01:29 6 because there's -- like I told you before, there's kind  
01:29 7 of ingredients into the calculation. There's some  
01:29 8 carry-forward remuneration and accrual.

01:29 9 So again, anything I say will be wrong. I  
01:29 10 think it's safe to say that my total financial package  
01:30 11 would be -- would be in the millions.

01:30 12 (End video.)

01:30 13 BY MS. MOYE:

01:30 14 Q. And that's your sworn deposition testimony,  
01:30 15 correct, Mr. Etchegoyen?

01:30 16 A. Yes. It would be eventually, yeah. I would  
01:30 17 eventually make millions -- eventually, I hope.

01:30 18 Q. Okay. And you would admit, wouldn't you, sir,  
01:30 19 that when it comes to testimony about WSOU, the  
01:30 20 plaintiff in this case, you have a bias; isn't that  
01:30 21 right?

01:30 22 A. Yes. Yes. I would have a bias towards the  
01:30 23 company.

01:30 24 Q. Thank you, sir.

01:30 25 Now, let's talk about WSOU doing business as

01:30 1 Brazos. In opening statements your counsel started by  
01:30 2 saying Brazos is based right here in Waco, Texas.

01:30 3 Do you remember that statement, sir?

01:31 4 A. I do, yes.

01:31 5 Q. And in fact, sir, isn't it true that WSOU was  
01:31 6 formed as a Delaware corporation?

01:31 7 A. I think that's true, yes.

01:31 8 Q. And it was formed with the name WSOU; isn't  
01:31 9 that correct?

01:31 10 A. I think that's correct. Yes.

01:31 11 Q. And it wasn't until January 7, 2020 that WSOU  
01:31 12 registered to do business in the State of Texas; isn't  
01:31 13 that right?

01:31 14 A. I don't handle that sort of thing, but that  
01:31 15 sounds right.

01:31 16 Q. Well, let's be sure. Let's take a look at  
01:31 17 Defendants' Trial Exhibit 0535. You should have it in  
01:31 18 your binder there.

01:31 19 A. Wait. Which tab is it, ma'am? Sorry.

01:32 20 MS. MOYE: May I approach the witness,  
01:32 21 Your Honor?

01:32 22 THE COURT: Of course.

01:32 23 A. Sorry to make you get up like that.

01:32 24 Thank you. Thank you for your help. I've got  
01:32 25 it.

01:32 1 BY MS. MOYE:

01:32 2 Q. Now, this, sir, is your application for  
01:32 3 registration in the State of Texas; is that correct?

01:32 4 A. Yes, ma'am.

01:32 5 Q. And it was filed January 7, 2020; is that also  
01:32 6 correct?

01:32 7 A. Yes, ma'am. That's here.

01:32 8 Q. And if you would turn further in that document  
01:32 9 with the page ending number 8, I'll wait for you to get  
01:33 10 that page. You can also see these on your screen if  
01:33 11 that's easier for you.

01:33 12 A. Oh, that's much easier. Thank you. I'll use  
01:33 13 the screen. Thank you for that.

01:33 14 Q. Yeah. Whichever you prefer.

01:33 15 And do you see there that there's a title  
01:33 16 "Assumed Name"?

01:33 17 A. I do. Yes.

01:33 18 Q. And the assumed name that WSOU filed for in  
01:33 19 January 2020 is the Brazos name that your client has  
01:33 20 been using, correct?

01:33 21 A. Brazos. Yes.

01:33 22 Q. And in June 2020, shortly after filing this  
01:33 23 assumed name and registering for business in Texas,  
01:33 24 that's when you filed this lawsuit, correct, sir?

01:33 25 A. Yes.

01:33 1 Q. Now, let's talk about the patent that is at  
01:34 2 issue, the '133 patent, but first I want to be clear on  
01:34 3 a couple of things. You gave extensive testimony about  
01:34 4 patents that you invented.

01:34 5 Do you remember that testimony?

01:34 6 A. Yes, ma'am.

01:34 7 Q. None of those patents are at issue in this  
01:34 8 lawsuit, are they, sir?

01:34 9 A. No, ma'am.

01:34 10 Q. You are not an inventor on the '133 patent  
01:34 11 that is at issue in this lawsuit, correct?

01:34 12 A. That's correct.

01:34 13 Q. You also gave extensive testimony about a  
01:34 14 Microsoft lawsuit.

01:34 15 Do you remember that, sir?

01:34 16 A. Yes. I remember mentioning Microsoft.

01:34 17 MS. KIM: Your Honor, may we approach?

01:34 18 THE COURT: Yes.

01:34 19 (Bench conference.)

01:34 20 MS. KIM: Your Honor, we are not -- we  
01:35 21 stopped asking anything about Microsoft litigation,  
01:35 22 prior litigation of any Microsoft. As soon as we  
01:35 23 received Your Honor's instruction, we have stopped  
01:35 24 doing that.

01:35 25 And Counsel, I think, is now getting back

01:35 1 into the Microsoft litigation, at which time I should  
01:35 2 be able to redirect then. Otherwise, we would ask  
01:35 3 VMware to not to go into Microsoft.

01:35 4 THE COURT: Well, let me make clear. I  
01:35 5 think it's fair for Defense Counsel to ask questions to  
01:35 6 clarify. But if Defense Counsel -- if Defense Counsel  
01:35 7 chooses to, say, ask questions, then she's opened the  
01:35 8 door for you to do whatever you want on redirect.

01:35 9 So it's up to you. I'm not telling  
01:35 10 either of you what to do. But if Defense Counsel wants  
01:35 11 to get into this, which I think is totally irrelevant  
01:35 12 and is wasting time, you can. And if because of that  
01:35 13 on redirect you want to get into it, which I think is  
01:35 14 totally irrelevant and a waste of time, it's you all's  
01:35 15 time.

01:35 16 MS. KIM: Thank you, Your Honor. I just  
01:35 17 wanted to make sure that --

01:35 18 MS. MOYE: Yeah. Understood. And that's  
01:35 19 really the only confirmation that I'm seeking from him,  
01:36 20 is that had nothing to do with this.

01:36 21 THE COURT: Y'all do whatever you want to  
01:36 22 do.

01:36 23 MS. KIM: Okay. Thank you.

01:36 24 (Bench conference concludes.)

01:36 25 BY MS. MOYE:

01:36 1 Q. Okay. We are back, Mr. Etchegoyen.

01:36 2 The Microsoft lawsuit, the technology that's  
01:36 3 at issue in this case, the '133 patent, did it have  
01:36 4 anything at all to do with the Microsoft lawsuit?

01:36 5 A. I'm sorry. Are you talking about the -- which  
01:36 6 Microsoft lawsuit?

01:36 7 Q. The one you referred to in your testimony,  
01:36 8 sir.

01:36 9 A. No. No.

01:36 10 Q. Had nothing to do with what we're here talking  
01:36 11 about today?

01:36 12 A. No. That patent -- I wasn't referencing  
01:36 13 the -- this patent in that lawsuit. No.

01:37 14 Q. Okay. Now, the patent that's at issue in this  
01:37 15 lawsuit, you were not an inventor on that '133 patent,  
01:37 16 correct?

01:37 17 A. That's correct, ma'am.

01:37 18 Q. And no one affiliated with WSOU had any  
01:37 19 involvement in the inventions that are at issue in the  
01:37 20 '133 patent, correct, sir?

01:37 21 A. That's correct.

01:37 22 Q. You, Mr. Etchegoyen, personally do not have  
01:37 23 the expertise to be able to tell us whether the '133  
01:37 24 patent in this case is valid; is that correct?

01:37 25 A. Yeah. I'm not a lawyer. I wouldn't be able



01:37 1 to do that.

01:37 2 Q. And you personally also do not have the  
01:37 3 expertise to be able to tell us whether any of the --  
01:37 4 whether the remaining patent in this lawsuit is  
01:37 5 infringed or not; is that correct, sir?

01:37 6 A. I trust -- no, ma'am. I'm not an expert  
01:38 7 witness.

01:38 8 Q. Now, the inventors of the '133 patent, none of  
01:38 9 them are coming to testify at this trial; is that  
01:38 10 right, sir?

01:38 11 A. I heard that in -- and I forgot his name. I'm  
01:38 12 sorry. I heard that in the opening.

01:38 13 Q. To your knowledge, are any of the inventors  
01:38 14 coming to testify in this lawsuit?

01:38 15 A. I don't know. I don't think so, according to  
01:38 16 the opening I heard.

01:38 17 Q. And your company, WSOU, did not take the  
01:38 18 depositions of any of those inventors, did they?

01:38 19 A. I'm sorry, ma'am. I don't know that. I don't  
01:38 20 know if they --

01:38 21 Q. You don't know one way or the other?

01:38 22 A. I don't know if the attorneys took the  
01:38 23 deposition of this particular inventor or not, as I sit  
01:38 24 here.

01:38 25 Q. You haven't seen any testimony from any

01:38 1 inventor of the '133 lawsuit --

01:38 2 MS. KIM: Objection, Your Honor.

01:38 3 THE COURT: I'm sorry. I didn't hear --  
01:38 4 if you would ask the question, and then I'll hear the  
01:39 5 objection.

01:39 6 BY MS. MOYE:

01:39 7 Q. I'll repeat the question.

01:39 8 Have you personally seen any testimony from  
01:39 9 any inventor of the '133 patent in this lawsuit?

01:39 10 MS. KIM: Your Honor, there was a MIL  
01:39 11 that was denied on this about referencing any prior  
01:39 12 proceeding or discovery hearings or any other dispute.

01:39 13 May I approach?

01:39 14 THE COURT: I'm going to -- I think he  
01:39 15 can answer whether or not he's seen any testimony with  
01:39 16 regard to -- from any of the inventors in this case.

01:39 17 MS. KIM: Thank you, Your Honor.

01:39 18 BY MS. MOYE:

01:39 19 Q. Can you answer the question, sir?

01:39 20 A. I don't think I've seen any testimony from an  
01:39 21 inventor. I don't think I'm allowed to.

01:39 22 Q. If there is a damages award in this case, will  
01:39 23 any inventor of the '133 patent receive any portion of  
01:39 24 that award?

01:39 25 A. I believe the inventor of this patent was

01:40 1 already paid by Nokia. We paid the money in advance.

01:40 2 Q. And let me ask my question again.

01:40 3 A. Yes, ma'am.

01:40 4 Q. If the jury awards damages in this lawsuit,  
01:40 5 would the inventors of the '133 patent receive any  
01:40 6 portion of those damages?

01:40 7 A. I don't think so.

01:40 8 Q. Thank you.

01:40 9 And, now, WSOU has a total of four employees;  
01:40 10 is that correct, Mr. Etchegoyen?

01:40 11 A. I believe that's correct. Yes.

01:40 12 Q. And WSOU's business is licensing and asserting  
01:40 13 patents; is that correct?

01:40 14 A. That is a part of our business. Yes.

01:40 15 Q. WSOU does not sell any products, does it?

01:40 16 A. Not yet. No, ma'am.

01:40 17 Q. And WSOU does not actually invent any software  
01:41 18 at this point, correct?

01:41 19 A. I am working on things, but no. No. WSOU  
01:41 20 wouldn't -- wouldn't -- I wouldn't consider it, invent  
01:41 21 anything yet.

01:41 22 Q. Prior to forming WSOU, you were part of a  
01:41 23 company called Uniloc; is that correct, sir?

01:41 24 You mentioned it, I believe, in your direct  
01:41 25 testimony.

01:41 1 A. Yes, ma'am.

01:41 2 Q. And Uniloc also had a patent licensing  
01:41 3 business; is that right?

01:41 4 A. Yes.

01:41 5 Q. And you, Mr. Etchegoyen, founded Uniloc, in  
01:41 6 part, correct?

01:41 7 A. I was the -- I was the cofounder with my  
01:41 8 friend, my friend Rick. Yes.

01:41 9 Q. And you founded one of the world's most  
01:41 10 experienced and successful patent licensing firms,  
01:42 11 Uniloc; is that correct, sir?

01:42 12 A. I don't know if it was the world's most -- it  
01:42 13 was -- it had a large licensing business, yes. I'm  
01:42 14 proud of that work.

01:42 15 Q. Let's take a look at what WSOU says about that  
01:42 16 on your website, sir.

01:42 17 A. Okay.

01:42 18 Q. That's Exhibit 11, I believe, in your binder.

01:42 19 A. I'm going to use the screen, if that's okay.  
01:42 20 Can I still use this?

01:42 21 Q. It's also on the screen. Yes.

01:42 22 And there is, on Page 4, a blurb about you.  
01:42 23 You see the first sentence there?

01:42 24 A. Yeah. You're saying --

01:42 25 Q. Craig Etchegoyen. Craig founded one of the

01:42 1 world's most experienced and successful patent  
01:42 2 licensing firms, Uniloc.

01:42 3 Do you see that?

01:42 4 A. Yes, ma'am. I see that.

01:42 5 Q. And that's a true statement, is it not, sir?

01:42 6 A. Yes.

01:43 7 Q. Now, let's talk a little more about the  
01:43 8 business of WSOU. And I'd like to first show you the  
01:43 9 operating agreement when that entity was founded.

01:43 10 MS. MOYE: Can we have DX-21?

01:43 11 And I apologize for going back, Your  
01:43 12 Honor, but I do need to offer DTX-0535 -- that's the  
01:43 13 registration document -- into evidence.

01:43 14 MS. KIM: No objection.

01:43 15 THE COURT: It'll be admitted.

01:43 16 BY MS. MOYE:

01:43 17 Q. Okay. Can you take a moment, look at WSOU  
01:43 18 Investments LLC Operating Agreement? You see that?

01:43 19 A. Yes, ma'am. I see the title.

01:43 20 Q. And you see it says "execution version"?

01:43 21 A. Yes, ma'am.

01:44 22 Q. And do you see that it says it's entered into  
01:44 23 and effective as of August 21, 2017?

01:44 24 A. Yes, ma'am. I see that date.

01:44 25 Q. Is this, Mr. Etchegoyen, a true and correct

01:44 1 copy of WSOU's operating agreement?

01:44 2 A. I believe you if you tell me it is. Yeah.

01:44 3 MS. MOYE: And we'd like to offer DTX-21  
01:44 4 into evidence also.

01:44 5 MS. KIM: No objection.

01:44 6 THE COURT: It'll be admitted.

01:44 7 BY MS. MOYE:

01:44 8 Q. Now, let's take a look at Page 1, Section 1.3.  
01:44 9 This is the section that says "character of  
01:44 10 business."

01:44 11 Do you see that, sir?

01:44 12 A. Yes, ma'am.

01:44 13 Q. And it says: The company shall acquire and  
01:44 14 thereafter own, manage, license and/or sell a portfolio  
01:44 15 of patents, patent applications and related  
01:44 16 intellectual property rights from Alcatel-Lucent, Nokia  
01:45 17 Solutions and Networks BV and Nokia Technology Oy.

01:45 18 Do you see that?

01:45 19 A. Yes, ma'am. I see that.

01:45 20 Q. And that is a correct statement of what the  
01:45 21 business of WSOU was to be, right?

01:45 22 A. Yes. I believe that's part of the business.

01:45 23 Q. It was created to license and sell patents  
01:45 24 acquired from Nokia/Alcatel-Lucent, correct, sir?

01:45 25 A. Yes. That's one of the business.

01:45 1 Q. And there is nothing in this character of  
01:45 2 business about incubation of other businesses, the  
01:45 3 things that you mentioned in your direct testimony, is  
01:45 4 there, sir?

01:45 5 A. Sorry. You're talking about 1.3?

01:45 6 Q. Yes. I am talking about 1.3.

01:45 7 A. Yes. In that one section there's no mention  
01:45 8 of that.

01:45 9 Q. Thank you.

01:45 10 And, now, in about July 2017, WSOU did  
01:46 11 actually purchase a number of patents from Nokia,  
01:46 12 correct?

01:46 13 A. Yes. That date sounds correct.

01:46 14 Q. And there was an original agreement and a  
01:46 15 series of amendments to that agreement; is that right,  
01:46 16 sir?

01:46 17 A. Yes, ma'am.

01:46 18 Q. And at the end of the day, WSOU obtained about  
01:46 19 8,000 patents from Nokia/Alcatel-Lucent; is that  
01:46 20 correct, sir?

01:46 21 A. I believe it was more than one transaction.  
01:46 22 So I don't want to be confused here. I want to answer  
01:46 23 your -- I believe it was more than 8,000. I believe  
01:46 24 worldwide it was something closer to 12,000.

01:46 25 Q. Okay. There were multiple agreements. And

01:46 1 you believe WSOU, your company, acquired closer to  
01:46 2 12,000 patents from Nokia/Alcatel-Lucent; is that  
01:46 3 correct?

01:46 4 A. Yes, ma'am. I believe that's not the exact  
01:47 5 number, but I believe that's in the realm of the exact  
01:47 6 number.

01:47 7 Q. Okay. And one of those patents that was  
01:47 8 obtained in those series of transactions is the '133  
01:47 9 patent that is at issue here, correct, sir?

01:47 10 A. Yes, ma'am.

01:47 11 Q. And your company, WSOU, made both a lump-sum  
01:47 12 payment to Nokia/Alcatel and some royalty payments to  
01:47 13 Nokia/Alcatel in order to get those patents, right?

01:47 14 A. We paid -- yes. We paid an upfront payment  
01:47 15 and then at that time a royalty. We talked about that  
01:47 16 earlier. A royalty back to them as well.

01:47 17 Q. Do you need some water or anything?

01:47 18 A. No, no. I'm good. I think it's actually  
01:47 19 getting better, believe it or not.

01:47 20 Q. Yeah.

01:47 21 And the total of the lump-sum payments, was  
01:47 22 that about 17 million, Mr. Etchegoyen?

01:48 23 A. I believe that was -- it was high 16s. I  
01:48 24 believe that's close to accurate, yes.

01:48 25 Q. Okay. And through the series of amendments



01:48 1 ultimately you agreed to stop paying any royalty  
01:48 2 payments to Nokia/Alcatel, right?

01:48 3 A. Well, we paid them in advance and bought out  
01:48 4 the -- bought out the royalty going forward.

01:48 5 Q. So at this point, as we sit here,  
01:48 6 Nokia/Alcatel would not receive any continuing  
01:48 7 royalties from your company as a result of these patent  
01:48 8 purchases, correct?

01:48 9 A. Yes. We paid them in advance on what we  
01:48 10 expect to make in royalties.

01:48 11 Q. Okay. Now, about 17 million -- or you said a  
01:49 12 little less than 17 million as a lump-sum payment,  
01:49 13 correct?

01:49 14 A. I could be off a little. I don't have them  
01:49 15 all memorized. But I think that is very, very close.  
01:49 16 It's a lot of money. It's very close.

01:49 17 Q. And then the royalty payments added a little  
01:49 18 bit more to that, correct?

01:49 19 A. I believe we paid close to 17 million, to use  
01:49 20 your words, was the total payment including that lump  
01:49 21 sum, I believe.

01:49 22 Q. Oh. Okay.

01:49 23 A. It might be more. I apologize.

01:49 24 Q. Yeah. I just want to make sure I and the jury  
01:49 25 hear you clearly. 17 million you believe was a total

01:49 1 of the lump sum plus the royalty payments made to  
01:49 2 Nokia/Alcatel-Lucent in order to obtain these patents,  
01:49 3 however many there were; is that right?

01:49 4 A. I believe that's -- I believe that's accurate,  
01:50 5 yes.

01:50 6 Q. And you have testified you believe there are  
01:50 7 about 12,000 of the patents that were actually  
01:50 8 purchased?

01:50 9 A. Yes. If that's worldwide, granted pending  
01:50 10 applications. That would also include expired patents  
01:50 11 and pending -- and pending patents. Patents that  
01:50 12 aren't granted yet.

01:50 13 Q. Now, when you bought the patents from Nokia,  
01:50 14 you were not focusing specifically on the patent that's  
01:50 15 at issue in this case, the '133 patent, were you, sir?

01:50 16 A. I'm sorry, ma'am. Could you explain your  
01:50 17 question?

01:50 18 Q. Let me try it a different way. Did you  
01:50 19 actually purchase -- I'm sorry. Let me start again.

01:50 20 Did you actually discuss the '133 patent, the  
01:50 21 patent that is at issue in this case, with Nokia as  
01:50 22 part of making your purchase arrangement?

01:50 23 A. No. Nope.

01:50 24 Q. Now, I'd like to have you identify a few more  
01:51 25 documents for us.

01:51 1 If we could take a look at DTX-22.

01:51 2 Tell me when you're ready, sir.

01:51 3 A. It's not coming on this screen.

01:51 4 (Off-the-record discussion.)

01:51 5 BY MS. MOYE:

01:51 6 Q. Sir, you see that this says patent purchase

01:51 7 agreement made as of July 22, 2017.

01:51 8 Do you see that?

01:51 9 A. Yes, ma'am. I see that date.

01:51 10 Q. And you see the parties to the agreement are

01:51 11 Alcatel-Lucent, Nokia Solutions, Nokia Technologies.

01:52 12 Do you see them?

01:52 13 A. Yes.

01:52 14 Q. And then the purchaser is Wade and Company.

01:52 15 Do you see that, sir?

01:52 16 A. I do.

01:52 17 Q. And Wade and Company was a predecessor to

01:52 18 WSOU; is that right, sir?

01:52 19 A. Could -- what do you mean predecessor? Sorry.

01:52 20 Q. Did Wade and Company assign its rights to the

01:52 21 Nokia/Alcatel patents to WSOU?

01:52 22 A. I believe that's correct, yes.

01:52 23 Q. Okay. Is this, sir, a copy of one of the

01:52 24 patent purchase agreements that led to WSOU ultimately

01:52 25 owning some patents previously owned by Nokia and

01:52 1 Alcatel-Lucent?

01:52 2 A. I believe that's correct, yes.

01:52 3 Q. Okay.

01:52 4 MS. MOYE: I'd like to offer DTX-22 into  
01:52 5 evidence.

01:52 6 MS. KIM: No objection, Your Honor.

01:52 7 THE COURT: It'll be admitted.

01:53 8 BY MS. MOYE:

01:53 9 Q. Okay. Let's take a look at DTX-79.

01:53 10 A. I touched the screen and put a red line on it.

01:53 11 (Off-the-record discussion.)

01:53 12 A. It's there. Don't worry. I messed it up too.  
01:53 13 I put a line on it.

01:53 14 BY MS. MOYE:

01:53 15 Q. Okay. This one says it's an amendment to the  
01:53 16 patent purchase agreement.

01:53 17 Do you see that?

01:53 18 A. Yes, ma'am. I see that.

01:53 19 Q. And it has the same parties, correct? The  
01:53 20 document we just saw?

01:53 21 A. Yes. I think that's accurate.

01:53 22 Q. Okay. And, sir, is this a copy of the first  
01:53 23 amendment to the patent purchase agreement that we just  
01:54 24 looked at? The first amendment to DTX-22?

01:54 25 A. I don't see where it says first, but I believe

01:54 1 you if you tell me.

01:54 2 Q. You're right. It does not say first. It says  
01:54 3 amendment. Probably because it's first, right?

4 A. Yeah. Right, right.

01:54 5 Q. Okay. It's an amendment. Okay?

01:54 6 A. I couldn't get into Harvard.

01:54 7 Q. Okay.

01:54 8 MS. MOYE: I'd like to offer DTX-79 into  
01:54 9 evidence, please.

01:54 10 MS. KIM: No objection, Your Honor.

01:54 11 THE COURT: It'll be admitted.

01:54 12 BY MS. MOYE:

01:54 13 Q. Let's take a look at DTX-78.

01:54 14 Do you have that, sir?

01:54 15 A. Yes, ma'am. I see it.

01:54 16 Q. Okay. And you see that it says it's an  
01:54 17 assignment of patent purchase agreement?

01:54 18 A. Yes, ma'am. I see that.

01:55 19 Q. With an effective date of July 22, 2017?

01:55 20 A. Yes. I see that. Yes, ma'am.

01:55 21 Q. Is this a assignment that WSOU entered into?

01:55 22 You may need to scroll to the bottom of the document to  
01:55 23 see that.

01:55 24 A. I can't -- I can't scroll on this.

01:55 25 Q. It's on -- before you now.

01:55 1 A. Oh, okay.

01:55 2 Q. Do you see that, sir?

01:55 3 A. I see that, yes.

01:55 4 Q. This is a document you signed?

01:55 5 A. I did, yes.

01:55 6 MS. MOYE: I'd like to introduce this one  
01:55 7 into evidence also. This is DTX-78.

01:55 8 And then if we could please publish it  
01:55 9 for the jury.

01:55 10 MS. KIM: No objection, Your Honor.

01:55 11 THE COURT: It'll be admitted.

01:55 12 BY MS. MOYE:

01:55 13 Q. Now, if you look at the paragraph in the  
01:55 14 middle below "now, therefore."

01:55 15 Do you see that language, sir? "Wade and  
01:55 16 company hereby assigns"?

01:56 17 A. Yes, ma'am. I see that.

01:56 18 Q. It says: Wade and Company hereby assigns to  
01:56 19 WSOU Investments LLC and WSOU Investments LLC hereby  
01:56 20 accepts the whole of the interest of Wade and Company  
01:56 21 in the patent purchase agreement.

01:56 22 You see that language?

01:56 23 A. Yes, ma'am.

01:56 24 Q. And so by this agreement, is it correct, sir,  
01:56 25 that Wade and Company assigned its rights in those

01:56 1 patent purchase agreements that we looked at earlier?

01:56 2 A. I believe so, yes.

01:56 3 Q. Okay. Thank you, sir.

01:56 4 MS. KIM: Objection. That calls for a  
01:56 5 legal conclusion, Your Honor.

01:56 6 THE COURT: I think he answered already.  
01:56 7 I'll overrule it.

01:56 8 MS. KIM: Thank you, Your Honor.

01:56 9 BY MS. MOYE:

01:56 10 Q. And let's look at DTX-23.

01:56 11 Can you, sir, just take a moment --

01:56 12 A. I'm sorry. It's not up again.

01:57 13 Q. Got to do it each time. She told me that.

01:57 14 Do you have it now?

01:57 15 A. It's there now, yes.

01:57 16 Q. Okay. And the title here is "Fifth Amendment  
01:57 17 To Patent Purchase Agreement."

01:57 18 Do you see that?

01:57 19 A. I do, yes.

01:57 20 MS. MOYE: And could you scroll to the  
01:57 21 bottom of that document, Mr. Eaton?

01:57 22 To the signature page. I'm sorry.

01:57 23 A. There's no signature page on here yet.

01:57 24 BY MS. MOYE:

01:57 25 Q. Okay. And do you see this -- on this

01:57 1 signature page the signature of Mr. Shanus, Mr. Stuart  
01:57 2 Shanus?

01:57 3 A. I do, yes.

01:57 4 Q. And Mr. Shanus is the president of WSOU; is  
01:57 5 that correct?

01:57 6 A. Yes, ma'am.

01:57 7 Q. Is this, sir, a copy of the fifth amendment --  
01:57 8 go back to the top -- to the patent purchase agreements  
01:58 9 between Nokia/Alcatel-Lucent on one hand and WSOU on  
01:58 10 the other?

01:58 11 A. I believe so, yes. I see it there.

01:58 12 MS. MOYE: So I'd like to introduce that  
01:58 13 one into evidence also.

01:58 14 MS. KIM: No objection, Your Honor.

01:58 15 THE COURT: It'll be admitted.

01:58 16 MS. MOYE: Now, if we could publish that  
01:58 17 for the jury.

18 BY MS. MOYE:

01:58 19 Q. And please look in particular at Section 3.2  
01:58 20 of this agreement.

01:58 21 Do you have that, Mr. Etchegoyen?

01:58 22 A. No, ma'am. It's somehow blocked out on here.

01:58 23 Q. Section 3.2 does not appear on your screen?

01:59 24 A. Oh, now it is. I see it. Yes.

01:59 25 Q. And do you see the language in 3.2 that says:



01:59 1 The parties agree that no royalties or reports shall be  
01:59 2 due on any proceeds for transactions executed?

01:59 3 Do you see that language?

01:59 4 A. I do. Yes.

01:59 5 Q. And by that language, did WSOU and  
01:59 6 Nokia/Alcatel-Lucent agree that there would be no  
01:59 7 ongoing royalty payments from WSOU to those  
01:59 8 counterparties, Nokia/Alcatel-Lucent?

01:59 9 A. I believe -- I don't know the number of the  
01:59 10 agreement, but I believe this is when -- what I was  
01:59 11 referencing earlier where we bought out -- the advanced  
01:59 12 royalties. We bought it out.

01:59 13 Q. Okay. Let me turn to another issue.

01:59 14 WSOU has actually licensed the portfolio of  
01:59 15 patents that it obtained from Nokia and Alcatel-Lucent;  
01:59 16 is that right, sir?

01:59 17 A. Yes, ma'am.

02:00 18 Q. And you personally negotiated all of WSOU's  
02:00 19 licenses to that portfolio, correct?

02:00 20 A. No. I don't think I negotiated all of the  
02:00 21 licenses.

02:00 22 Q. Okay. Let's take a look at your sworn  
02:00 23 deposition testimony again. Deposition at Page 209,  
02:00 24 Line 22 to Line 210, 9. Page 210, 9.

02:00 25 (Video played.)

02:00 1 Q. Mr. Etchegoyen, you have negotiated all of the  
02:00 2 outbound licenses that WSOU has engaged in, correct?

02:00 3 A. I'm the person that negotiates the business  
02:00 4 terms, but I do rely on people without a Holiday Inn  
02:00 5 Express (inaudible).

02:00 6 So yeah. I think Stu is a big part of that  
02:00 7 training on -- on the legal perspective, but yeah. I'm  
02:01 8 the business terms negotiator.

02:01 9 (End video.)

02:01 10 BY MS. MOYE:

02:01 11 Q. Thank you, sir.

02:01 12 And that's your sworn testimony, correct?

02:01 13 A. Yes.

02:01 14 Q. Now, all of the licenses for this Nokia  
02:01 15 portfolio that you've negotiated have been lump sum; is  
02:01 16 that correct, sir?

02:01 17 A. I believe so. Yes. I believe so.

02:01 18 Q. Let's talk about some of those license  
02:01 19 agreements.

02:01 20 MS. MOYE: Let's take a look -- if the  
02:01 21 witness can be shown DTX-60.

22 BY MS. MOYE:

02:01 23 Q. Do you have it there?

02:01 24 A. It's up. Yes.

02:01 25 Q. Okay. And, sir, take a moment and look at

02:01 1 this and tell us: Is this, in fact, a license  
02:01 2 agreement between WSOU and AT&T that covers the patents  
02:02 3 WSOU obtained from Nokia?

02:02 4 A. I can only see that first page, but yes. AT&T  
02:02 5 is on there. And --

02:02 6 MS. MOYE: I'd like to offer DTX-60 into  
02:02 7 evidence.

02:02 8 MS. KIM: No objection, Your Honor.

02:02 9 THE COURT: It'll be admitted.

02:02 10 MS. MOYE: Can we have it published to  
02:02 11 the jury now?

02:02 12 Now, if we could look in particular at  
02:02 13 Article 3, which has the license fee.

02:02 14 If you could blow that up, Mr. Eaton.

02:02 15 BY MS. MOYE:

02:02 16 Q. And it says here: In consideration, AT&T and  
02:02 17 its affiliates agree to pay Licensor -- that's WSOU --  
02:02 18 a one-time, lump-sum payment of \$2 million.

02:02 19 Do you see that?

02:03 20 A. Yes, ma'am.

02:03 21 Q. In exchange for that lump-sum payment, AT&T  
02:03 22 obtained a perpetual worldwide license to use the  
02:03 23 entire portfolio of patents that WSOU had acquired from  
02:03 24 Nokia; is that right, sir?

02:03 25 A. That's correct.

02:03 1 Q. Let's take a look at another license  
02:03 2 agreement.

02:03 3 MS. MOYE: If we could have DTX-91  
02:03 4 displayed for the witness.  
02:03 5 BY MS. MOYE:

02:03 6 Q. I think I got this now. I'm close.

02:03 7 Okay. Would you take a moment and look at  
02:03 8 that and tell us if you can confirm that this is, in  
02:03 9 fact, a copy of a license agreement between Amazon and  
02:03 10 WSOU, again, for the Nokia portfolio of patents?  
02:03 11 Can you confirm that for us, sir?

02:04 12 A. I see Amazon's name. Yes. And WSOU.

02:04 13 Q. Okay.

02:04 14 MS. MOYE: I'd like to admit DTX-91 into  
02:04 15 evidence.

02:04 16 MS. KIM: No objection, Your Honor.

02:04 17 THE COURT: It'll be admitted.

02:04 18 MS. MOYE: And if we could display that  
02:04 19 one for the jury.

02:04 20 BY MS. MOYE:

02:04 21 Q. Now, let's look at Article 3, license fee, in  
02:04 22 this Amazon agreement.

02:04 23 And here we see a one-time, lump-sum payment  
02:04 24 of \$1,850,000.

02:04 25 Do you see that?

02:04 1 A. Yes, ma'am. I see that.

02:04 2 Q. And in return for that lump-sum payment of  
02:04 3 1.85 million, Amazon also received a license to all of  
02:05 4 the patents in that portfolio that WSOU had obtained  
02:05 5 from Nokia; is that right?

02:05 6 A. I believe that's accurate. Yes.

02:05 7 Q. And Amazon was able to use those patents, and  
02:05 8 its affiliates, for any purpose whatsoever under this  
02:05 9 license agreement; isn't that correct, sir?

02:05 10 A. I don't know. I don't know if that's a legal  
02:05 11 term. I don't know.

02:05 12 Q. Let's look at Section 5.01 in the agreement.  
02:05 13 Section 5.01 says: Licensor -- that is again  
02:05 14 WSOU -- hereby grants to Amazon a nonexclusive,  
02:05 15 worldwide, perpetual, irrevocable, fully paid-up,  
02:06 16 royalty-free license, including the right to -- if you  
02:06 17 look at Subsection I -- make, use, sell, offer to sell,  
02:06 18 import or otherwise dispose of or exploit licensed  
02:06 19 products or services.

02:06 20 Do you see that language, sir?

02:06 21 A. Yes, ma'am. I see that language.

02:06 22 Q. Okay. Now, let's talk about the licenses to  
02:06 23 Facebook. And actually, before I do that, I want to  
02:06 24 get the timeline right on this.

02:06 25 MS. MOYE: If we could look at DTX-60

02:06 1 again. The first page.

02:06 2 BY MS. MOYE:

02:06 3 Q. What is the effective date of this license  
02:06 4 agreement?

02:06 5 MS. MOYE: We may have to go to the back  
02:06 6 page to get that.

02:06 7 A. Sorry. I can't see that.

02:06 8 BY MS. MOYE:

02:06 9 Q. Yeah. They're going to move it back.

02:06 10 A. Oh, okay.

02:06 11 Q. Okay. Do you see, sir, that Mr. Shanus signed  
02:06 12 this agreement on behalf of WSOU in March of 2018,  
02:07 13 March 22, 2018?

02:07 14 A. Yes, ma'am.

02:07 15 Q. Okay.

02:07 16 MS. MOYE: And then let's go back to the  
02:07 17 Amazon agreement. That is DTX-91.

02:07 18 BY MS. MOYE:

02:07 19 Q. And that agreement is dated April 10, 2018; is  
02:07 20 that right, Mister?

02:07 21 A. It says April 10, 2018. Yes.

02:07 22 Q. Okay.

02:07 23 MS. MOYE: And now let's turn to the  
02:07 24 Facebook agreements, DTX-63 and DTX-64.

02:07 25 BY MS. MOYE:

02:07 1 Q. Do you have those in front of you now, sir?

02:07 2 A. Yes, ma'am.

02:07 3 Q. And can you take a moment and look at those  
02:07 4 and confirm for us that these are license agreements  
02:07 5 that WSOU entered into with Facebook, they also cover  
02:08 6 the full portfolio of patents WSOU had acquired from  
02:08 7 Nokia; is that right, sir?

02:08 8 A. I believe that's accurate. Yes.

02:08 9 Q. And both of these are entered on what date?  
02:08 10 Could you take a look at that and tell us?

02:08 11 A. I think it says the 14th of November 2018.

02:08 12 Q. Okay.

02:08 13 MS. MOYE: I would like to admit DTX-63  
02:08 14 and 64 into evidence.

02:08 15 MS. KIM: No objections to 63 or 64, Your  
02:08 16 Honor.

02:08 17 THE COURT: They'll be admitted.

02:08 18 MS. MOYE: Could we publish those for the  
02:08 19 jury, please?

02:08 20 BY MS. MOYE:

02:08 21 Q. Now, I'd like to focus on Section 3.1 in these  
02:08 22 agreements. And I believe we have DTX-63 on the top,  
02:09 23 that Article 3.

02:09 24 Do you see that?

02:09 25 A. I see both Article 3s. Yes.

02:09 1 Q. Okay. But let's focus on the one on the top.  
02:09 2 The one on the top says the consideration for the  
02:09 3 license is \$800,000.

02:09 4 Do you see that?

02:09 5 A. Yes, ma'am.

02:09 6 Q. Okay. That's from 63.

02:09 7 And then the one on the bottom, it says the  
02:09 8 consideration is \$200,000; is that correct, sir?

02:09 9 A. I see that. Yes.

02:09 10 Q. And so Facebook got a license to use the  
02:09 11 entire Nokia/Alcatel-Lucent portfolio for \$1 million, a  
02:09 12 total of \$1 million; is that correct, sir?

02:09 13 A. That's correct. Yes.

02:09 14 Q. And Facebook also was -- had the same kind of  
02:09 15 grant of rights. It was able to use these patents in  
02:09 16 whatever way it saw fit; is that right, sir?

02:09 17 A. I don't know if the -- I don't know if the  
02:10 18 language says that.

02:10 19 Q. Well, let's look at Section 5.01.

02:10 20 And do you see that it says: Licensor -- that  
02:10 21 again's WSOU, you're giving Facebook a nonexclusive,  
02:10 22 worldwide, perpetual, irrevocable, fully paid-up,  
02:10 23 royalty-free license under the licensed patents to  
02:10 24 make, have made, use, sell or offer to sell?

02:10 25 Do you see that?



02:10 1 A. Yes, ma'am. I see that.

02:10 2 Q. And let's look at the other Facebook license  
02:10 3 agreement.

02:10 4 Do you see that same language in Article 5  
02:10 5 there?

02:10 6 A. It looks the same to me. Yes.

02:10 7 Q. So Facebook also got a license for a total of  
02:11 8 1 million to use the whole patent portfolio, the whole  
02:11 9 Nokia/Alcatel-Lucent patent portfolio?

02:11 10 A. I think that's accurate. Yes.

02:11 11 Q. Okay. And then just one final thing. You  
02:11 12 mentioned that you thought the assertion that this is  
02:11 13 old technology was incorrect.

02:11 14 Do you remember saying that in your direct  
02:11 15 testimony?

02:11 16 A. Yes, ma'am.

02:11 17 Q. I'd just like you to take a look at the front  
02:11 18 page of the '133 patent.

02:11 19 MS. MOYE: If we could put that up.

02:11 20 I don't know if this is already in  
02:11 21 evidence.

02:11 22 MS. KIM: I don't believe it is,  
02:11 23 Ms. Moye.

02:11 24 MS. MOYE: We'd like to introduce it into  
02:11 25 evidence.

02:11 1 MS. KIM: No objection, Your Honor.

02:11 2 MS. MOYE: Thank you.

02:11 3 THE COURT: I couldn't -- no objection?

02:11 4 MS. KIM: No objection, Your Honor.

02:11 5 THE COURT: It'll be admitted.

02:12 6 MS. MOYE: And could you blow up, please,  
02:12 7 the file date on this patent?

02:12 8 Are we displaying it for the jury now?

02:12 9 Yes? Okay.

02:12 10 BY MS. MOYE:

02:12 11 Q. And do you see this was filed March 23, 2006,  
02:12 12 sir?

02:12 13 A. I see that date, yes.

02:12 14 Q. And that means that the inventions that are at  
02:12 15 issue in the '133 patent had to precede 2006, correct,  
02:12 16 sir?

02:12 17 A. That's correct.

02:12 18 Q. And we are now in 2023; is that right, sir?

02:12 19 A. Yes. We are.

02:12 20 Q. Okay. Thank you. I pass the witness.

02:12 21 MS. KIM: I'm going to carry these  
02:12 22 binders. I just need a minute.

02:13 23 I would just want to make sure the  
02:13 24 jurors' screen -- your screens are working. I think I  
02:13 25 got a comment that maybe they're off. Are they working

02:13 1 currently?

02:13 2 MS. MOYE: I'm having difficulty hearing  
3 Counsel.

02:13 4 MS. KIM: Oh, I'm just making sure the  
02:13 5 jurors can see the screens. I heard they were  
02:13 6 sometimes off. You can see them okay?

02:13 7 (Off-the-record discussion.)

02:13 8 MS. KIM: Okay. I'm going to use some of  
02:13 9 the ones that are already admitted so I can just call  
02:13 10 them out then. I don't know how to use this thing,  
02:13 11 though.

02:13 12 (Off-the-record discussion.)

02:13 13 BY MS. KIM:

02:14 14 Q. Welcome back, Mr. Etchegoyen. I just want to  
02:14 15 ask you a couple questions, following up with some  
02:14 16 things that Ms. Moye had asked you.

02:14 17 Could you confirm for us, who owns the '133  
02:14 18 patent?

02:14 19 A. WSOU, Brazos.

02:14 20 Q. Is the '133 Brazos' property?

02:14 21 A. Yes, ma'am.

02:14 22 Q. Is the '133 a patent that Nokia partnered with  
02:14 23 you on?

02:14 24 A. Yes.

02:14 25 Q. And I think earlier you said something. We

02:14 1 were talking about the inventors and how you're not the  
02:14 2 inventor of the '133 patent. And you had said that  
02:14 3 they had been paid in advance.

02:14 4 Can you explain a little bit more in detail  
02:14 5 what you meant by that? About the inventors of the  
02:14 6 '133 patent being paid?

02:14 7 A. We pay -- we paid Nokia in advance, you know,  
02:14 8 millions of dollars on the patents. And it's my  
02:14 9 understanding from Nokia, one thing I love about them,  
02:15 10 is that they take care of their -- the inventors  
02:15 11 directly on the patents that they invent. They have a  
02:15 12 structure, like a bonus structure.

02:15 13 MS. MOYE: Objection, Your Honor. No  
02:15 14 foundation.

02:15 15 THE COURT: Overruled.

02:15 16 BY MS. KIM:

02:15 17 Q. You may continue, Mr. Etchegoyen.

02:15 18 A. I can go? Okay.

02:15 19 Q. Yeah.

02:15 20 A. That's really it. I mean, they -- they're  
02:15 21 great. They take care of the inventors really well at  
02:15 22 Nokia. And AT&T and Alcatel-Lucent, Bell Labs.

02:15 23 Q. I'll go back to them in just a second here.

02:15 24 Ms. Moye also asked you quite a few questions  
02:15 25 about the fact that the inventors are not here. And

02:15 1 you hadn't seen any testimony from them.

02:15 2 Do you remember that?

02:15 3 A. I do, yes.

02:15 4 Q. Is it your understanding that there's any  
02:15 5 requirement for an inventor to come and testify at a  
02:15 6 patent trial?

02:15 7 A. No. Most inventors don't. They do not want  
02:16 8 to sit up here.

02:16 9 Q. It looks kind of fun. You sure?

02:16 10 MS. MOYE: Again, objection, foundation.

02:16 11 THE COURT: Overruled.

02:16 12 BY MS. KIM:

02:16 13 Q. Do you have anything to add to that,  
02:16 14 Mr. Etchegoyen?

02:16 15 A. No.

02:16 16 Q. Sorry. My handwriting's a little messy. Let  
02:16 17 me try to make sure I know what I'm reading here.

02:16 18 MS. KIM: I'd like to bring up -- I don't  
02:16 19 believe this particular -- it was the first exhibit,  
02:16 20 but it didn't have an exhibit number. It was the  
02:16 21 Brazos Licensing website.

02:16 22 Do I just hit the button? I don't see  
02:16 23 anything on my screen. Did we admit the website? Is  
02:16 24 that why it's not on here?

02:17 25 MR. ROSENTHAL: It's not admitted.

02:17 1 MR. LOVE: It's not admitted.

02:17 2 MS. KIM: Is there a way for your -- I  
02:17 3 forget your name, Eagan (sic), Mr. Eaton to bring it up  
02:17 4 and then maybe we can add a sticker and get it  
02:17 5 admitted?

02:17 6 (Conference between counsel.)

02:17 7 BY MS. KIM:

02:17 8 Q. Do you remember seeing -- do you remember  
02:17 9 seeing this website? When Ms. Moyer showed you this is  
02:17 10 Brazos' website here we're looking at?

02:17 11 A. Yes.

02:17 12 Q. And she asked you about how -- there was a  
02:17 13 certain portion where she asked you about all the --  
02:17 14 about your time at Uniloc and it being one of the -- I  
02:17 15 forget the word, something about it being a very  
02:18 16 successful licensing company.

02:18 17 Do you remember that?

02:18 18 A. Yes. In the bios I remember that.

02:18 19 Q. I think when you print a website it just looks  
02:18 20 kind of weird. But I want to take a look at a couple  
02:18 21 other portions that are on that same website that has  
02:18 22 been printed out.

02:18 23 I'm going to read just a couple of segments on  
02:18 24 what is Page 2 of the printout on the website. You  
02:18 25 probably just have to scroll to see it.

02:18 1 It says here: Most companies and inventors  
02:18 2 spend time and money on R&D -- which I believe is  
02:18 3 research and development -- legal, crafting, filing and  
02:18 4 other costs associated with building and safeguarding  
02:18 5 their technology.

02:18 6 Do you see that?

02:18 7 A. Yes.

02:18 8 Q. Do you agree with that?

02:18 9 A. Absolutely.

02:18 10 Q. And then it says: The patent-related costs  
02:18 11 are often in vain, as the technology ends up not being  
02:18 12 core to the business.

02:18 13 Did I read that correctly?

02:18 14 A. Yes.

02:18 15 Q. Do you agree with that?

02:18 16 A. Yes. That does happen.

02:19 17 Q. It goes on to say: Even when the technology  
02:19 18 is core, patents sit idle on a balance sheet. Worse  
02:19 19 yet, they rack up maintenance costs on an annual basis.

02:19 20 Do you see that?

02:19 21 A. Yes. I see that.

02:19 22 Q. What does it mean by maintenance costs?

02:19 23 A. You have to -- for a portfolio of patents or a  
02:19 24 patent you pay -- you pay fees. Like you pay the U.S.  
02:19 25 government, in our case, I don't know, hundreds of

02:19 1 thousands of dollars a month. You pay fees to have the  
02:19 2 right to have your patents -- they more or less charge  
02:19 3 you rent and maintenance. They're called maintenance  
02:19 4 fees. Other countries have them as well.

02:19 5 Q. Thank you, Mr. Etchegoyen.

02:19 6 And then it goes on to say if you owned a  
02:19 7 hotel, would you let rooms sit vacant and unoccupied?

02:19 8 Do you see that?

02:19 9 A. I do, yes.

02:19 10 Q. And I think common sense would tell us no,  
02:20 11 right?

02:20 12 A. I agree with that, yeah.

02:20 13 Q. Then it goes on to say: Instead of dragging  
02:20 14 down your balance sheet, it's time to turn your patents  
02:20 15 into cash-flowing assets.

02:20 16 Do you see that?

02:20 17 A. I do, yes.

02:20 18 Q. And then it says: If competitors are  
02:20 19 infringing on your IP, they should be paying rent.

02:20 20 Do you see that?

02:20 21 A. I do.

02:20 22 Q. Do you agree with that?

02:20 23 A. I do.

02:20 24 Q. The point of patenting technology is to ensure  
02:20 25 that anyone using your intellectual property is paying



02:20 1 for the hard work and upfront costs you incurred when  
02:20 2 developing the technology.

02:20 3 Do you see that?

02:20 4 A. I do, yes.

02:20 5 Q. Do you agree with that?

02:20 6 A. I do.

02:20 7 Q. And I just want to direct your attention to  
02:20 8 one other portion of the website which is printed out  
02:20 9 here. It says: Brazos Licensing & Development,  
02:20 10 headquartered in Waco, Texas, leverages its propriety  
02:20 11 technology and management experience to help inventors  
02:20 12 and patent owners maximize the full potential of their  
02:20 13 patents.

02:20 14 Do you see that?

02:20 15 A. I do, yes.

02:20 16 Q. Do you agree with that?

02:20 17 A. I do.

02:21 18 Q. Mr. Etchegoyen, you were also here when  
02:21 19 Ms. Moye had asked you about somewhere between 8- and  
02:21 20 12,000 patents that had been purchased.

02:21 21 Do you remember that?

02:21 22 A. Yes.

02:21 23 Q. And she had asked you, I think, whether you  
02:21 24 had looked at the '133 patent which is the patent we're  
02:21 25 asserting here in this case.

02:21 1 Do you remember that?

02:21 2 A. I do.

02:21 3 Q. And I believe this morning Mr. Rosenthal said,  
02:21 4 based on the documents Ms. Moyer put up, somewhere in  
02:21 5 the ballpark of \$17 million was paid for all the  
02:21 6 patents, broken down by 8- to 12,000 -- I'm horrible at  
02:21 7 math -- it came down to \$2,000 a patent or so.

02:21 8 Do you remember that?

02:21 9 A. I do, yes.

02:21 10 Q. Are all patents of equal value?

02:22 11 A. No. No.

02:22 12 Q. Are some patents more valuable than others  
02:22 13 that were bought from Nokia?

02:22 14 A. Absolutely.

02:22 15 Q. Were the network congestion technology  
02:22 16 something you thought was valuable in the Nokia patent  
02:22 17 portfolio?

02:22 18 A. I -- yes.

02:22 19 Q. Does the '133 patent relate to network  
02:22 20 congestion technology based on what you've heard so far  
02:22 21 today?

02:22 22 A. Yes. Very important.

02:22 23 Q. I want to next talk about Ms. Moyer asking you  
02:22 24 about a buyout of the royalties.

02:22 25 Do you remember that?

02:22 1 A. Yes, ma'am.

02:22 2 Q. You paid Nokia 9.78 million, something like  
02:22 3 that, to no longer have to pay them a 20 percent  
02:22 4 back-end.

02:22 5 Do you recall?

02:22 6 A. Yes.

02:22 7 Q. What is your understanding as to why Nokia was  
02:23 8 willing to agree to do that?

02:23 9 A. I don't know exactly all the reasons. But I  
02:23 10 think we are taking all of the risks as far as paying  
02:23 11 them in advance for what, you know, royalties and  
02:23 12 getting paid for our invention going forward. I think  
02:23 13 that -- I think that was a big reason.

02:23 14 And also we had started the licensing program.  
02:23 15 And I believe that Nokia had licensed Apple for a ton  
02:23 16 of money, and others, Samsung and -- for a ton of  
02:23 17 money. And I think that they -- I think billions. And  
02:23 18 they -- I think we ultimately served our purpose,  
02:23 19 probably, to them in resetting the market and letting  
02:23 20 the market know that they were going to -- you know,  
02:23 21 they were going to be vigilant about licensing their  
02:23 22 patents.

02:23 23 Q. And I want to now talk about towards the end  
02:23 24 of Ms. Moye's questions to you, we went over a few  
02:24 25 licenses. They included AT&T, Amazon and a two-part

02:24 1 Facebook license.

02:24 2 Do you remember that?

02:24 3 A. I do, yes.

02:24 4 Q. And AT&T, I think, as we saw -- I won't put it  
02:24 5 back up because I don't know how to work the system --  
02:24 6 I think we saw it was \$2 million for all 8- to 12,000  
02:24 7 patents.

02:24 8 Do you remember that?

02:24 9 A. I do.

02:24 10 Q. Was AT&T already licensed to any of those?

02:24 11 A. AT&T was already licensed to all of the  
02:24 12 patents.

02:24 13 Q. And why is that?

02:24 14 A. Because they're a Nokia customer. And the  
02:24 15 deal we had with Nokia is that we could not license --  
02:24 16 or we could not litigate or license their -- their  
02:24 17 customers.

02:24 18 Q. You mean you couldn't sue AT&T?

02:24 19 A. We could not sue AT&T at all.

02:24 20 Q. Mr. Etchegoyen, in your -- I think  
02:24 21 Mr. Rosenthal said you've been doing this for the  
02:24 22 better part of 20 years.

02:24 23 How many license negotiations do you think  
02:24 24 you've done?

02:24 25 A. Maybe 800 --

02:25 1 Q. 800?

02:25 2 A. -- 900.

02:25 3 Q. So somewhere between 750 and 1,000 deals?

02:25 4 A. I think that's probably right. I could be off  
02:25 5 a little, but yes. A lot.

02:25 6 Q. Is there a checklist of what you go through,  
02:25 7 or is every one of those unique?

02:25 8 A. Oh, they're all very, very, very unique,  
02:25 9 depends on what the company wants. You know, it's like  
02:25 10 any sort of business transaction. They, you know, the  
02:25 11 company might want -- AT&T in this case, might want --  
02:25 12 the fact that we've started buying other patent assets  
02:25 13 outside of this Nokia transaction, they might see a ton  
02:25 14 of value in our expertise in acquiring new technology  
02:25 15 in patents, so they pay us \$2 million because they were  
02:25 16 already licensed to the rest of the other portfolio.  
02:25 17 So they saw value in that as well.

02:25 18 That would be an example of one.

02:25 19 Q. Did you file a lawsuit against AT&T?

02:26 20 A. No.

02:26 21 Q. How did you get them to license?

02:26 22 A. I believe one of -- I believe a broker brought  
02:26 23 them in and they asked us for a license. They found  
02:26 24 value in what we were doing and asked us for a license  
02:26 25 instead of litigating.

02:26 1 Q. How about Amazon?

02:26 2 A. That was similar. The head of -- the head of  
02:26 3 Amazon, not Jeff Bezos, the head of their license --  
02:26 4 the IP general counsel, I believe, is his title. He  
02:26 5 and the broker kind of came to us with a -- with an  
02:26 6 offer to license.

02:26 7 Q. And Facebook as well. Did you sue them, or  
02:26 8 how did that Facebook license come about or the  
02:26 9 two-parter?

02:26 10 A. They also came to us directly. No. We did  
02:26 11 not sue them.

02:26 12 Q. What impact does whether you have to sue a  
02:26 13 company or not have on -- and this is very general. I  
02:27 14 understand you say every license deal is unique and  
02:27 15 different.

02:27 16 But generally speaking, what impact does not  
02:27 17 having a lawsuit against an entity do to the price that  
02:27 18 somebody would be willing to pay?

02:27 19 A. I mean, not litigating is by far the preferred  
02:27 20 method for us. I mean, we much -- we much rather have  
02:27 21 companies pay and -- pay for our intellectual property  
02:27 22 and not take it for free.

02:27 23 It's -- it's -- normally, I mean, I would say  
02:27 24 99 percent of the time, it would be very significantly  
02:27 25 less than licensing that you would get after litigation

02:27 1 because you don't have the costs.

02:27 2 I mean, litigation is by far -- I think we've  
02:27 3 spent, you know, \$52 million litigating, and we  
02:27 4 probably spent less than \$100,000 on all -- on all of  
02:27 5 those other licenses combined.

02:28 6 Q. I'm going to ask you a very obvious question.

02:28 7 Did you voluntarily license VMware, or did you  
02:28 8 have to sue them?

02:28 9 A. Well, yeah. I mean, we've been doing this for  
02:28 10 a couple of years. So yes. Unfortunately, we've had  
02:28 11 to sue them. Unfortunately.

02:28 12 MS. KIM: I can pass the witness back.

02:28 13 RECROSS-EXAMINATION

02:28 14 BY MS. MOYE:

02:28 15 Q. Just a couple of very quick questions,  
02:28 16 Mr. Etchegoyen.

02:28 17 A. Yes, ma'am.

02:28 18 Q. You mentioned a broker that assisted with some  
02:28 19 of your licensing efforts.

02:28 20 Do you recall that?

02:28 21 A. I'm sorry. Excuse me.

02:29 22 Q. Yes.

02:29 23 A. Could you repeat it? I'm sorry. I was  
02:29 24 coughing in the microphone. I apologize.

02:29 25 Q. No problem.

02:29 1 You mentioned just now in talking with your  
02:29 2 counsel that you used a broker in some of your  
02:29 3 licensing efforts, someone to help you with that.

02:29 4 Do you recall that?

02:29 5 A. Yes. We've had brokers.

02:29 6 Q. And that -- the name of that broker's -- the  
02:29 7 name of the company was AQUA; is that correct, sir?

02:29 8 A. I believe -- I believe that's correct. Yes.

02:29 9 Q. And I'd like to have you take a look at  
02:29 10 DTX-27.

02:29 11 A. I think it's still on that. Okay. It's up.

02:29 12 Q. Yes. Got it. Got it.

02:29 13 Take a moment and look at this exhibit and  
02:29 14 tell us, can you confirm that this is an agreement that  
02:29 15 your company, WSOU, entered into with AQUA?

02:29 16 A. It looks that way. Yes. I see AQUA's name.

02:30 17 MS. MOYE: I'd like to introduce DTX-27  
02:30 18 into evidence.

02:30 19 MS. KIM: No objection, Your Honor.

02:30 20 THE COURT: It'll be admitted.

02:30 21 MS. MOYE: Can we now display it for the  
02:30 22 jury?

02:30 23 BY MS. MOYE:

02:30 24 Q. Mr. Etchegoyen, what is the effective date of  
02:30 25 this agreement with AQUA?



02:30 1 A. It looks like September 26, 2017.

02:30 2 Q. Okay.

02:30 3 MS. MOYE: And if we could blow up that  
02:30 4 first paragraph engagement.

02:30 5 Actually, let's go back. Can we go back  
02:30 6 to the top? We need to define what SPV means.

7 BY MS. MOYE:

02:30 8 Q. So if you look at that language "WSOU  
02:30 9 Investments LLC, a Delaware company," you see that  
02:30 10 language, sir?

02:30 11 A. I do. Yes.

02:30 12 Q. And it says, "hereafter SPV," do you see that?

02:30 13 A. I do see that.

02:30 14 Q. And that means in the remainder of the  
02:30 15 document, when they say "SPV," they're referring to  
02:31 16 WSOU, your company, correct?

02:31 17 A. I think that's accurate. Yes.

02:31 18 Q. Okay. Now let's look at the engagement  
02:31 19 paragraph.

02:31 20 And it says: SPV -- that's WSOU -- hereby  
02:31 21 engages AQUA as its exclusive representative in  
02:31 22 conjunction with the sale or other commercial  
02:31 23 disposition of the patents listed in the appendix.

02:31 24 Do you see that?

02:31 25 A. I see that. Yes.

02:31 1 Q. And in this agreement was WSOU engaging AQUA  
02:31 2 as its exclusive representative to try to help with  
02:31 3 licensing of the Nokia/Alcatel-Lucent patent portfolio?

02:31 4 A. We hired -- our brokers represented us in the  
02:31 5 market to license our patents without litigation. Yes.

02:31 6 Q. Okay. And this license was entered in  
02:32 7 September 2017, right?

02:32 8 A. That's correct.

02:32 9 Q. Before the AT&T license that we looked at  
02:32 10 earlier? You need to see the date on that again, sir?

02:32 11 A. No. I think it is before. I'm comfortable  
02:32 12 saying that.

02:32 13 Q. And before the Amazon agreement; is that  
02:32 14 correct, sir?

02:32 15 A. I believe that's accurate. Yes.

02:32 16 Q. And before the Facebook agreement?

02:32 17 A. That one's a little faint, but yes. I believe  
02:32 18 so. I believe those were all after 2017.

02:32 19 Q. And AQUA actually assisted you with  
02:32 20 negotiating those license agreements, correct, sir?

02:32 21 A. Yes.

02:32 22 MS. MOYE: And then just one clean-up  
02:32 23 item, Your Honor. Because we have read so much from  
02:32 24 this website entry, I would like to introduce it into  
02:32 25 evidence.

02:32 1 We need to get an evidence number and a  
02:32 2 tab to put on it, but I would like to introduce it.

02:33 3 MS. KIM: No objection, Ms. Moye.

02:33 4 THE COURT: It'll be admitted.

02:33 5 MS. MOYE: Nothing else.

02:33 6 FURTHER REDIRECT EXAMINATION

02:33 7 BY MS. KIM:

02:33 8 Q. I will be brief.

02:33 9 Mr. Etchegoyen, we just looked at the AQUA  
02:33 10 agreement. It was the 2017 September, and it expired  
02:33 11 one year, so 2018 September; is that right?

02:33 12 A. Yes.

02:33 13 Q. And you're aware that Mr. McMillan at AQUA,  
02:33 14 the company that you entered into that license --  
02:33 15 that -- sorry -- monetization agreement, the broker, he  
02:33 16 had offered Dell -- are you aware that he had offered  
02:33 17 Dell a chance to license for 2 and a half million?

02:33 18 A. Yes. I became aware of that. Yes.

02:33 19 Q. Are you aware that that was done around  
02:33 20 August 2018?

02:33 21 A. It sounds familiar.

02:33 22 Q. So almost five years ago?

02:33 23 A. Yes.

02:34 24 Q. In August of 2018, were you or your company,  
02:34 25 Brazos, aware of the value of the '133 patent?

02:34 1 A. No.

02:34 2 Q. Were you aware of the extent of VMware's use  
02:34 3 of the patent?

02:34 4 A. No.

02:34 5 Q. Based on what you heard from Ms. Moye, does it  
02:34 6 appear to -- I can't read my own writing.

02:34 7 Based on Ms. Moye's question, does it appear  
02:34 8 that VMware knew since 2018 that it could have been  
02:34 9 using the '133 patent with Brazos' permission?

02:34 10 MS. MOYE: Objection. That's a  
02:34 11 mischaracterization of anything that was said.

02:34 12 THE COURT: Overruled.

02:34 13 BY MS. KIM:

02:34 14 Q. Let me make the question a little bit more  
02:34 15 clear. I'm sorry.

02:34 16 I'm asking you, Mr. Etchegoyen, in 2018,  
02:34 17 Mr. McMillan as your exclusive broker offered 2 and a  
02:35 18 half million license to all patents to Dell, correct?

02:35 19 A. Correct.

02:35 20 Q. So since that time Dell and VMware, EMC, all  
02:35 21 those companies, they have been using the '133 patent  
02:35 22 without Brazos' permission, correct?

02:35 23 A. Correct.

02:35 24 MS. KIM: I can pass the witness.

02:35 25 MS. MOYE: Just one final question.

## FURTHER RECROSS-EXAMINATION

BY MS. MOYE:

Q. Counsel just asked you about this Dell situation, the offer that your exclusive broker made.

Do you remember that?

A. I do. Yes.

Q. Yes. And is it correct, Mr. Etchegoyen, that you did not send any type of notice out to Dell or VMware saying, "I think you infringe my patent" before filing this lawsuit?

A. I don't know what he -- I don't know what he sent, you know, list of patents, explanations. I don't know what he sent.

Q. I'm asking about what you sent, what you did --

A. Oh, me personally.

Q. -- what your company did.

Yes. Did WSOU send any notice to Dell, EMC or VMware saying "I believe you are infringing" any patent that WSOU owned before filing this lawsuit?

A. I don't think I'm allowed to say infringing. I personally wouldn't have sent anything like that, me, personally.

Q. So the answer's no?

A. The answer's no. I wouldn't have done that.

02:36 1 Q. Thank you.

02:36 2 FURTHER REDIRECT EXAMINATION

02:36 3 BY MS. KIM:

02:36 4 Q. Hello again.

02:36 5 A. Hi.

02:36 6 Q. Mr. Etchegoyen, earlier you testified that you  
02:36 7 are not somebody who would look at the patent as an  
02:36 8 expert witness and say who infringes and who doesn't --

02:36 9 MS. MOYE: Objection, Your Honor. Beyond  
02:36 10 the scope.

02:37 11 THE COURT: Beyond the scope of what you  
02:37 12 just asked?

02:37 13 MS. MOYE: Yes.

02:37 14 THE COURT: Sustained.

02:37 15 BY MS. KIM:

02:37 16 Q. Mr. Etchegoyen, based on Ms. Moye's question,  
02:37 17 she asked you about whether you had given notice to  
02:37 18 Dell about the '133 patent.

02:37 19 Do you remember that just now?

02:37 20 A. I do.

02:37 21 Q. And you said no?

02:37 22 A. I personally wouldn't be -- I think that's a  
02:37 23 legal term. I wouldn't be able to give notice.

02:37 24 Q. Based on what you heard from VMware's counsel  
02:37 25 today, does it appear that VMware has known since 2018

02:37 1 that it was using the patent?

02:37 2 MS. MOYE: Objection. Foundation.

02:37 3 THE COURT: Sustained.

02:37 4 BY MS. KIM:

02:37 5 Q. Mr. Etchegoyen, sitting here today knowing  
02:37 6 what you know now, would you have licensed all of  
02:37 7 Brazos' 12,000 patents for \$2.5 million five years ago?

02:37 8 A. No way.

02:37 9 MS. KIM: I pass the witness.

02:37 10 MS. MOYE: Nothing further, Your Honor.

02:38 11 THE COURT: Thank you.

02:38 12 Ladies and gentlemen of the jury, we'll  
02:38 13 take our afternoon recess.

02:38 14 A couple of things I need to tell you.  
02:38 15 One, until you begin deliberating at the end of the  
02:38 16 trial, you can't talk about the case amongst  
02:38 17 yourselves. So you can talk about the Dallas Cowboys.  
02:38 18 I don't know what y'all talk about when you're not with  
02:38 19 me. But whatever it is, baking shows, whatever it is  
02:38 20 you can talk about, but not the case.

02:38 21 Number two, you may do not do any  
02:38 22 research about the case. You've learned who the  
02:38 23 plaintiff is. You know who the defendant is. We want  
02:38 24 you to make your decisions based exclusively on the  
02:38 25 evidence you hear here.

02:38 1 Three, I'm told by my two college-age  
02:38 2 sons there's something called social media. I'm not on  
02:38 3 it. I don't really know what it is. But I'm told it  
02:38 4 exists. And if you all want to be on social media,  
02:38 5 that's certainly fine. But until the trial is over and  
02:39 6 you've reached a verdict, you may not post anything,  
02:39 7 whatever that means, but you can't put anything up  
02:39 8 about this case or what's going on on social media.

02:39 9 Once you've finished with your verdict,  
02:39 10 it's America. You can do whatever you want. But  
02:39 11 during this week you can't post anything about the  
02:39 12 trial.

02:39 13 So we'll take a 10- or 15-minute recess.  
02:39 14 And then we'll come back and take up the next witness.

02:39 15 THE BAILIFF: All rise.

02:39 16 (Jury exited the courtroom.)

02:39 17 THE COURT: You may step down.

02:43 18 (Off-the-record discussion.)

02:44 19 THE COURT: Now, you all had some issues  
02:44 20 to take up with respect to the next witness.

02:44 21 MR. ROSENTHAL: Yes, Your Honor. I have  
02:44 22 some issues with the demonstratives from Plaintiff's  
02:44 23 technical expert, Dr. McClellan, which thankfully there  
02:44 24 are a lot fewer of them. So they're only on the '133  
02:44 25 patent.



02:44 1 Essentially there's just a ton of  
02:44 2 demonstratives that are just outside the scope. And I  
02:44 3 can give some examples. But this -- for instance,  
02:44 4 there's opinions on claim construction.

02:44 5 If we could, as an example, could we go  
02:44 6 to Slide 55 of the '133 deck?

02:44 7 So you see here he's got the Court's  
02:44 8 claim construction. And then he's got Dr. McClellan's  
02:44 9 plain and ordinary meaning. That's nowhere in his  
02:44 10 report. That's just brand new.

02:44 11 As another example, if we could put up  
02:45 12 Claim No. 27 -- or Slide No. 27.

02:45 13 So this figure, you saw this in the  
02:45 14 opening statement. This is littered throughout  
02:45 15 Dr. McClellan's report over and over and over again --  
02:45 16 I'm sorry. In his demonstratives. It is nowhere in  
02:45 17 his report. He doesn't cite to that page. It  
02:45 18 doesn't -- it's just brand new.

02:45 19 As another example --

02:45 20 THE COURT: Well, we have an easy  
02:45 21 solution. Before -- the jury won't see this. You will  
02:45 22 see this before the jury does.

02:45 23 MR. ROSENTHAL: Then I'll stand up.

02:45 24 THE COURT: And you can stand up and say,  
02:45 25 I object. And then you're going to say it's not in his

02:45 1 report.

02:45 2 And they're going to favor me by saying,  
02:45 3 of course it is. It's on this page at this paragraph.  
02:45 4 Because they won't show a demonstrative where they  
02:45 5 don't know how they can quickly cite to the report.

02:45 6 MR. ROSENTHAL: That resolves all of my  
02:45 7 questions.

02:45 8 THE COURT: And if the response to you  
02:45 9 saying it's not in the report is them saying, I don't  
02:45 10 know where it is in the report, then you win.

02:45 11 MR. ROSENTHAL: Got it, Your Honor.  
02:45 12 Thank you.

02:45 13 THE COURT: So -- and that's -- that goes  
02:46 14 both ways. I mean, that would be the same way when  
02:46 15 you're putting on your evidence.

02:46 16 MR. ROSENTHAL: We took that very  
02:46 17 seriously. We've cut a lot of stuff from our  
02:46 18 testimony.

02:46 19 THE COURT: Anything else we need to take  
02:46 20 up?

02:46 21 MR. ROSENTHAL: Not from me, Your Honor.

02:46 22 MR. WALDROP: There was a --

02:46 23 THE COURT: Yes, sir.

02:46 24 MR. WALDROP: If that's resolved, Your  
02:46 25 Honor, on that --

1 THE COURT: Yes.

02:46 2 MR. WALDROP: Thank you, Your Honor.

02:46 3 There was one other issue, Your Honor,  
02:46 4 that I wanted to raise about claim construction, Your  
02:46 5 Honor. And --

02:46 6 THE COURT: What is it you want to do?

02:46 7 MR. WALDROP: What I want to do, Your  
02:46 8 Honor, is preserve for the record any -- the plain and  
02:46 9 ordinary meaning they're going to put on in their case,  
02:46 10 Your Honor, I think creates scope -- it improperly  
02:46 11 narrows the scope of the claims such that it creates  
02:46 12 confusion.

02:46 13 THE COURT: And when does that come up?

02:46 14 MR. WALDROP: Well, it's going to come up  
02:46 15 right with Dr. McClellan because he was going to say --  
02:46 16 so he's going to give his plain and ordinary -- if you  
02:46 17 will allow him to do that, Your Honor, it's fine.

02:46 18 My only point was, Your Honor, that there  
02:46 19 is confusion about -- you know what, Your Honor, we can  
02:47 20 wait if you want. How about that, Your Honor, if you  
02:47 21 want to wait.

02:47 22 (Off-the-record bench conference.)

02:47 23 THE COURT: Okay. So Mr. Waldrop and  
24 Mr. Rosenthal, I'll just, again, I'll listen to the  
02:47 25 testimony on direct and cross. And if there's an issue

02:47 1 about that, you can either ask to approach the bench or  
02:47 2 you can make an objection and I'll rule on it.

02:47 3 Is there anything else we need to take  
02:47 4 up?

02:47 5 MR. WALDROP: Your Honor, if I -- could I  
02:47 6 preserve it for the record, Your Honor, just these  
02:47 7 three here --

02:47 8 THE COURT: Well, there's nothing to  
02:47 9 preserve right now --

02:47 10 MR. WALDROP: Okay, yeah.

02:47 11 THE COURT: -- because there's no  
02:47 12 evidence. That's what I'm saying is once we begin what  
02:48 13 I'm sure will be a fascinating march through the  
02:48 14 infringement testimony of this expert --

02:48 15 MR. WALDROP: Yes, sir.

02:48 16 THE COURT: -- and the jury is sitting on  
02:48 17 the edge of their chairs --

02:48 18 MR. WALDROP: Absolutely.

02:48 19 THE COURT: -- waiting like I will be, if  
02:48 20 you ask something that involves the disputed claim  
02:48 21 term, if Mr. Rosenthal's unhappy, he can object or ask  
02:48 22 to approach. And at that time I'll take up whatever it  
02:48 23 is and rule on it.

02:48 24 MR. WALDROP: Thank you, Your Honor. I  
02:48 25 appreciate it.

02:48 1 THE COURT: I know that you all think  
02:48 2 that right now the jury is back there hoping that  
02:48 3 there's going to be an infringement expert and  
02:48 4 wondering about what he's going to say and wondering  
02:48 5 what his interpretation of each claim term will be.  
02:48 6 But I think that's unlikely.

02:48 7 MR. WALDROP: Thank you, Your Honor.

02:48 8 THE COURT: So let me say one thing,  
02:48 9 because I forgot to and it didn't come up. But just so  
02:48 10 you all know, here's my policy on talking to witnesses,  
02:48 11 the lawyers talking to witnesses -- their witnesses.

02:48 12 If your witness is on the stand on  
02:49 13 direct, if we take a break, you are free to continue to  
02:49 14 talk to your witness. And I try to not break when --  
02:49 15 if it screws us up.

02:49 16 But if the witness is on cross, then the  
02:49 17 lawyer who put the witness on may not speak to the  
02:49 18 witness because the witness is on cross. There is one  
02:49 19 exception, and I don't know who your -- I couldn't tell  
02:49 20 if this gentleman was your client or client  
02:49 21 representative or not. But you get one client per  
02:49 22 side. And because it's a client, I'm not going to tell  
02:49 23 you that you can't talk to your client, regardless of  
02:49 24 where we're at in the trial. Because you all need to  
02:49 25 be able to talk to your client.

02:49 1 So but you only get one. You don't get  
02:49 2 to talk to someone and -- but in that rare situation  
02:49 3 you can always talk to your client about anything,  
02:50 4 whoever that one person is that you need to be  
02:50 5 coordinating with and making sure of what's going on.  
02:50 6 Regardless of what else is happening in the trial.

02:50 7 So you all take a short break and we'll  
02:50 8 come back.

02:50 9 MR. WALDROP: Thank you, Your Honor.

02:50 10 THE BAILIFF: All rise.

02:50 11 (Recess taken.)

03:04 12 THE BAILIFF: All rise.

03:05 13 THE COURT: Please remain standing for  
03:05 14 the jury.

03:05 15 (Jury entered the courtroom.)

03:05 16 THE COURT: Thank you. You may be  
03:05 17 seated.

03:05 18 Counsel, you may call your next witness.

03:05 19 MR. WALDROP: Thank you, Your Honor.

03:05 20 Plaintiff calls Dr. Stan McClellan.

03:05 21 (The witness was sworn.)

03:05 22 DIRECT EXAMINATION

03:05 23 BY MR. WALDROP:

03:06 24 Q. Good afternoon, Dr. McClellan.

03:06 25 A. Good afternoon.

03:06 1 Q. Please introduce yourself to the ladies and  
03:06 2 gentlemen of the jury.

03:06 3 A. My name's Stan McClellan. I'm a professor at  
03:06 4 Texas State University.

03:06 5 Q. Now, Dr. McClellan, have you been retained as  
03:06 6 an expert witness in this case on behalf of Brazos?

03:06 7 A. Yes.

03:06 8 Q. And you heard me during my opening statement  
03:06 9 on behalf of Plaintiff. I talked about a technical  
03:06 10 witness for Brazos?

03:06 11 A. Yes.

03:06 12 Q. Was I referring to you?

03:06 13 A. I believe so.

03:06 14 Q. Okay. Thank you.

03:06 15 So are you aware that this is a patent  
03:06 16 infringement case, Dr. McClellan, between Brazos and  
03:06 17 VMware?

03:06 18 A. Yes.

03:06 19 Q. And, Dr. McClellan, please describe to us what  
03:07 20 you were asked to do for this case and in this case.

03:07 21 A. I was asked to review the documents that were  
03:07 22 produced in the case, the patents of course, the claims  
03:07 23 of the patents, and the technologies that are asserted  
03:07 24 as being infringing.

03:07 25 Q. Now, do you know Mr. Craig Etchegoyen

03:07 1 personally before taking this matter?

03:07 2 A. No. I hadn't met him until a few days ago.

03:07 3 Q. And just so we're clear, this is an important  
03:07 4 question, Dr. McClellan. Did you reach any opinions  
03:07 5 concerning whether VMware's accused products infringe  
03:07 6 the '133 patent?

03:07 7 A. Yes.

03:07 8 Q. And what are your opinions regarding whether  
03:07 9 VMware's VeloCloud Edge or SD-WAN devices infringe  
03:07 10 Claim 13 of the '133 patent?

03:07 11 A. The accused products VeloCloud Edge and  
03:07 12 Gateway devices literally infringe Claim 13 of the '133  
03:07 13 patent.

03:07 14 Q. And, Dr. McClellan, have you prepared any  
03:07 15 slides to help illustrate your testimony for the jury?

03:08 16 A. Yes.

03:08 17 Q. And we'll talk about your opinions in a few  
03:08 18 minutes, but right now I'm required by the law, I'm --  
03:08 19 required to talk about your qualifications to testify  
03:08 20 as an expert in this case.

03:08 21 Can I do that?

03:08 22 A. Uh-huh.

03:08 23 Q. Now, let's talk about your background,  
03:08 24 qualifications and the like.

03:08 25 Now, where did you grow up, Dr. McClellan?



03:08 1 A. I was born in Georgetown. I grew up as a  
03:08 2 child in Valley Mills, which is just a few miles from  
03:08 3 here. My family is from the Central Texas area for  
03:08 4 over 100 years. And largely, you know, west of Valley  
03:08 5 Mills, over Coleman County and so on. So I've lived in  
03:08 6 Texas most of my life.

03:08 7 Q. Are you married?

03:08 8 A. Yes.

03:08 9 Q. Do you have any kids?

03:08 10 A. I have four kids.

03:08 11 Q. Let's talk about your -- let's turn to your  
03:08 12 professional and educational background, Dr. McClellan.  
03:08 13 I want to turn to Slide --

03:08 14 MR. WALDROP: -- next -- oh, you got it.  
03:08 15 Thank you.

16 BY MR. WALDROP:

03:08 17 Q. And this -- what I'm showing -- and I'll move  
03:08 18 this into evidence, this is PTX-200. I'll move this  
03:09 19 into evidence.

03:09 20 What is this, Dr. McClellan?

03:09 21 A. This looks like my resume.

03:09 22 Q. And, Dr. McClellan -- Dr. McClellan, what do  
03:09 23 you do for a living?

03:09 24 A. I'm a faculty member at the Texas State  
03:09 25 University in the Ingram School of Engineering where I

03:09 1 work on a bunch of different types of projects.

03:09 2 MR. WALDROP: Can I move PTX-200 into  
03:09 3 evidence?

03:09 4 Thank you.

03:09 5 MR. ROSENTHAL: No objection, Your Honor.

03:09 6 THE COURT: It'll be admitted.

03:09 7 BY MR. WALDROP:

03:09 8 Q. Can you provide us a general description of --  
03:09 9 regarding what you do in those roles at Texas State  
03:09 10 University?

03:09 11 A. I've served in several different roles there.  
03:09 12 I was recruited out of industry to Texas State to help  
03:09 13 start the Ingram School of Engineering from scratch.  
03:09 14 And I thought that would be an interesting challenge,  
03:09 15 particularly since a lot of my encounters with  
03:09 16 undergraduate students graduating from larger  
03:09 17 universities were substandard for corporate purposes.

03:10 18 So I helped start the school of engineering  
03:10 19 there. I was director of the school for several  
03:10 20 years -- associate director, and then director of the  
03:10 21 school. And my aim has been to help students find  
03:10 22 useful employment through the practice of engineering.

03:10 23 A couple of projects that I work on there that  
03:10 24 focus in that -- in that vein are what's called the  
03:10 25 JETS program. It's a program that provides direct

03:10 1 engineering, technology and science support for NASA's  
03:10 2 Johnson Space Center in Houston where we engage a lot  
03:10 3 of students, get them directly involved in a lot of  
03:10 4 really interesting projects that go on at Johnson Space  
03:10 5 Center.

03:10 6           You may have heard of recently of the Hayabusa  
03:10 7 missions and stuff, where they sent an astroid hunter  
03:10 8 into space and shot the astroid with a bullet and then  
03:10 9 collected the debris off the astroid.

03:10 10           They brought that debris -- that spaceship  
03:10 11 came back to Earth with that debris, and that debris is  
03:10 12 now being studied at Johnson Space Center partially  
03:11 13 involving some of the students from Texas State  
03:11 14 University. That's one of those programs.

03:11 15           The other program is the Connected  
03:11 16 Infrastructure Initiative, and I think -- you want me  
03:11 17 to talk about that now or later?

03:11 18           Q.     You can go ahead and talk about that briefly  
03:11 19 now while we're here.

03:11 20           A.     So the Connected Infrastructure Initiative is  
03:11 21 a state-funded activity for economic development in the  
03:11 22 Central Texas area.

03:11 23           The purpose of it is to stimulate new  
03:11 24 business, engage with business in different ways,  
03:11 25 particularly around really hard, challenging problems

03:11 1 that we face that have to do with resource consumption,  
03:11 2 water constraint, electricity provision, so on, as well  
03:11 3 as interesting challenges that have to do with how  
03:11 4 technology rolls out.

03:11 5 A lot of -- so the consortium is a group of  
03:11 6 largely municipalities and non-governmental entities,  
03:11 7 but also companies and, you know, places like the YMCA.  
03:11 8 The YMCA is a member of the consortium because they're  
03:12 9 concerned about how these technologies that they don't  
03:12 10 understand are going to impact people's health, how  
03:12 11 they're going to impact life going forward and so on.

03:12 12 So the consortium is a state-funded activity  
03:12 13 to do economic development as well as education for the  
03:12 14 students that are graduating from Texas State.

03:12 15 Q. Now, Dr. McClellan, please tell us about your  
03:12 16 education starting with high school.

03:12 17 A. I graduated from high school in Clint, Texas,  
03:12 18 which is kind of in West Texas, and went from there to  
03:12 19 attend undergraduate school at Texas A&M.

03:12 20 After I graduated from Texas A&M with a degree  
03:12 21 in electrical and computer engineering, I went to work  
03:12 22 for aerospace and defense companies in the Dallas/Fort  
03:12 23 Worth area.

03:12 24 After a few years working there, I was  
03:12 25 recruited by Texas A&M to come back to school to work

03:12 1 on graduate studies, so I went back to Texas A&M. I  
03:12 2 finished a master's degree and a Ph.D.

03:12 3 Q. I will say go Aggies, right?

03:12 4 A. You say gig 'em, Aggies. There's a couple of  
03:13 5 other things that you don't say. So...

03:13 6 Q. Yeah. Yeah.

03:13 7 A. That's enough.

03:13 8 (Simultaneous conversation.)

03:13 9 BY MR. WALDROP:

03:13 10 Q. You know, I'll get there. Roll tide. Thank  
03:13 11 you for that, Dr. McClellan.

03:13 12 Now, I also see from your resume, I see that  
03:13 13 you started a company as well, Dr. McClellan, and what  
03:13 14 was that company?

03:13 15 A. Yeah. In about the 2008 time frame, I became  
03:13 16 concerned with electricity consumption and how that was  
03:13 17 going to affect our lives going forward and I did some  
03:13 18 experiments with communications on the electrical grid.

03:13 19 And those experiments were strangely  
03:13 20 successful, so we started a company around that. We  
03:13 21 filed some patents and we started a company. And my  
03:13 22 co-inventor was in Boulder, Colorado. So that's why  
03:13 23 the company is located in Boulder, Colorado.

03:13 24 Company was called Power Tagging Technologies,  
03:13 25 and we were funded partially by the U.S. National

03:13 1 Science Foundation for the purpose of commercialization  
03:13 2 of this technology, several million dollars.

03:13 3 And we were also funded partially by Dominion  
03:13 4 Energy, which is the third or fourth largest energy  
03:14 5 services provider in the United States.

03:14 6 And we were funded also by Lockheed Martin  
03:14 7 because there were Homeland Security implications of  
03:14 8 the technology. The top technology is still in play  
03:14 9 today as it was absorbed into a wholly owned subsidiary  
03:14 10 of Dominion.

03:14 11 Q. I also see from your resume, Dr. McClellan,  
03:14 12 that you served in executive roles at large  
03:14 13 corporations. Please discuss that -- please describe  
03:14 14 that for us.

03:14 15 A. Well, I worked for Hewlett-Packard and -- for  
03:14 16 several years. And after I finished my graduate degree  
03:14 17 at Texas A&M, I got a job in academia at the University  
03:14 18 of Alabama at Birmingham. That's why I'm not allergic  
03:14 19 to roll tide and also Bear Bryant coached at Texas A&M.  
03:14 20 So that's all good.

03:14 21 Q. Absolutely.

03:14 22 A. So I worked at UAB for awhile. And because of  
03:14 23 the work that I did there, I was recruited out of UAB  
03:14 24 by -- at that time was Tandem Computers. Tandem  
03:14 25 Computers is the big computer company that started in

03:15 1 Austin that pioneered online transaction processing.

03:15 2 Tandem was absorbed by Compaq. Compaq was  
03:15 3 absorbed by HP. So because that's all very painful to  
03:15 4 deal with, I just put HP on there.

03:15 5 I was a distinguished technologist for HP.  
03:15 6 And in that role I got involved with a lot of different  
03:15 7 projects, product launch, product decommission, how to  
03:15 8 price products, competitive posture, intellectual  
03:15 9 property, mergers and acquisitions, and things of that  
03:15 10 nature.

03:15 11 Q. You mentioned that you were a distinguished  
03:15 12 technologist at HP or Hewlett Packard.

03:15 13 What is that?

03:15 14 A. A distinguished technologist is somebody who  
03:15 15 has provided extraordinary value to the company and has  
03:15 16 technical -- in a technical way to change the way the  
03:15 17 company works, a change in the way the company makes  
03:15 18 money and things like that.

03:15 19 I think there was something like a quarter of  
03:15 20 a percent of the employees -- overall employees of  
03:16 21 Hewlett Packard were distinguished technologists. It  
03:16 22 was less than 100.

03:16 23 Q. What work did you do at HP that led to you  
03:16 24 being selected as a distinguished technologist at HP?

03:16 25 A. I was involved in a lot of different projects

03:16 1 at HP that contributed to that. My secondary title was  
03:16 2 worldwide solution architect.

03:16 3 So one of the main things I did was I engaged  
03:16 4 with large companies, network service providers,  
03:16 5 telecommunications equipment manufacturers,  
03:16 6 technologies suppliers to help create new products and  
03:16 7 new avenues for new products and sales opportunities  
03:16 8 for new products.

03:16 9 One of those -- one of those avenues was the  
03:16 10 changeover from the telecommunications network, the  
03:16 11 wireless telecommunications network from 2G to 3G to 4G  
03:16 12 and all that kind of stuff. That was a huge  
03:16 13 undertaking.

03:16 14 And so I spent a lot of time basically in  
03:16 15 technical negotiations with various companies to try to  
03:17 16 enable some of those technologies and along the way  
03:17 17 find places for HP technology to be fit in there so  
03:17 18 that we could make money.

03:17 19 Q. I also see within your resume, Dr. McClellan,  
03:17 20 that you worked in the defense industry developing  
03:17 21 technology for our military; is that right?

03:17 22 A. All right. When I finished my undergraduate  
03:17 23 degree, I worked for LTV Aerospace and General Dynamics  
03:17 24 in Grand Prairie and Fort Worth, respectively.

03:17 25 I worked on -- in both of those places, I



03:17 1 worked on things related to flight simulators, realtime  
03:17 2 flight simulators, reconnaissance.

03:17 3 This was back in the '80s. And back at that  
03:17 4 time, we didn't have Google Maps and we didn't have  
03:17 5 Google Earth. So the military had things that were  
03:17 6 like that, that were even higher resolution than we  
03:17 7 have today, at that time.

03:17 8 And so a lot of those things were for mission  
03:17 9 rehearsals for the Navy, Navy pilots, mission  
03:17 10 rehearsals for Air Force pilots, and the AFTI/F-16  
03:18 11 program was an experimental fighter jet program that  
03:18 12 Air Force pilots would fly around and experiment with  
03:18 13 new technologies.

03:18 14 Q. Now, as an electrical engineer, do you have a  
03:18 15 specialty within the field of electrical engineering,  
03:18 16 Dr. McClellan?

03:18 17 A. That's really difficult to say. Typically  
03:18 18 what I get specialized in is things that communicate,  
03:18 19 whether they communicate wirelessly or by fiber or by  
03:18 20 copper, and some cases where they communicate using  
03:18 21 power signals.

03:18 22 So anything that happens to communicate. And  
03:18 23 that, you know, fortunately or unfortunately, covers an  
03:18 24 extremely broad area.

03:18 25 Q. Now, Dr. McClellan, I also understand that

03:18 1 you're the named inventor on a number of patents in the  
03:18 2 electrical engineering and networking field.

03:18 3 How many patents do you have in this field?

03:18 4 A. I don't know. Probably 20.

03:18 5 Q. And are all of these patents in the electrical  
03:19 6 engineering/networking field?

03:19 7 A. Yeah. Some of them have to do with  
03:19 8 communications systems that deal with medical devices,  
03:19 9 you can see on the right at UAB. Stuff that has to do  
03:19 10 with communications systems and networks on the left.  
03:19 11 And then other types of communication capabilities and  
03:19 12 technologies at the top.

03:19 13 Q. Now, during -- during your time in your  
03:19 14 professional history, Dr. McClellan, had you ever heard  
03:19 15 of Bell Labs?

03:19 16 A. Oh, yeah.

03:19 17 Q. And what was your -- what was your  
03:19 18 understanding of Bell Labs -- what was the significance  
03:19 19 of Bell Labs?

03:19 20 A. Bell Labs was the gold standard for  
03:19 21 communications technologies starting early in the  
03:19 22 1900s.

03:19 23 Q. During your professional career did you have  
03:19 24 an understanding of Alcatel-Lucent?

03:19 25 A. Alcatel is the AT&T of France. Lucent was --

03:19 1 I don't remember exactly where Lucent came from. I  
03:19 2 think it was a spin-off of Bell Labs. And so Alcatel  
03:19 3 and Lucent merged, and that was a merger of two really  
03:20 4 inventive and large companies.

03:20 5 Q. Would you consider them still inventive today?

03:20 6 A. Absolutely. Alcatel was prominent in the  
03:20 7 introduction of DSL lines which was -- started the  
03:20 8 broadband revolution.

03:20 9 Q. Are you familiar, during your professional  
03:20 10 background, with Nokia?

03:20 11 A. Absolutely.

03:20 12 Q. And what was your understanding of the  
03:20 13 innovativeness of Nokia?

03:20 14 A. Nokia was very innovative in a lot of  
03:20 15 different areas. They don't just make handsets. They  
03:20 16 make network equipment, they make computers. They make  
03:20 17 all kinds of stuff.

03:20 18 In my role at HP, I negotiated directly with  
03:20 19 Nokia and Ericsson and other European companies,  
03:20 20 including Alcatel, Siemens and lots of other ones,  
03:20 21 around different kinds of computer technologies that  
03:20 22 would be introduced into the wireless communications  
03:20 23 network as it transitioned forward to 2G, 3G, 4G and so  
03:20 24 on.

03:20 25 Q. And I want to ask you an important question.

03:21 1 You probably heard some of this morning. As to the  
03:21 2 '133 patent that we're talking about, based on your  
03:21 3 professional background, would you consider the '133  
03:21 4 patent old technology?

03:21 5 A. No.

03:21 6 Q. Why not?

03:21 7 A. It uses -- it uses some inventive approaches  
03:21 8 to dealing with problems that are faced by every  
03:21 9 network every day, today. And the -- I mean, one of  
03:21 10 the deals with patents is that the inventors of the  
03:21 11 patents, your job is to sort of predict the future.

03:21 12 And this is one of those cases where the  
03:21 13 inventors of the patents kind of predicted the future.  
03:21 14 They knew that congestion was going to be a big deal in  
03:21 15 future networks because data traffic's never going to  
03:21 16 go away. And so they came up with approaches to manage  
03:21 17 that congestion.

03:21 18 And it worked. Those were approaches that  
03:21 19 hadn't been used up to that point. And they're just  
03:21 20 now starting to be used by various other technologies.

03:21 21 Q. Now, I know we're about to talk a lot about  
03:21 22 electrical engineering. So for the purposes of  
03:22 23 illustrating to the jury, what is electrical  
03:22 24 engineering?

03:22 25 A. I got to start that with a joke. People are

03:22 1 always shocked when they find out how well I can wire a  
03:22 2 circuit.

03:22 3 I'll just let that sink in for a minute.

03:22 4 Electrical engineers deal with electricity and  
03:22 5 electronics for the purposes of doing something  
03:22 6 positive for humanity. Electrical engineers deal with  
03:22 7 the electrical power system. That's a very narrow area  
03:22 8 of electrical engineering.

03:22 9 Electrical engineers deal with communication  
03:22 10 systems, telephone systems, Internet, things like that.  
03:22 11 They deal with software, they deal with semiconductors.  
03:22 12 They deal with all kinds of technologies that you use  
03:22 13 on a daily basis and don't even understand that they're  
03:22 14 there.

03:22 15 Electrical engineers designed the monitors  
03:22 16 that you're looking at this slide on. It's a very  
03:22 17 broad field and it touches everybody in a lot of  
03:22 18 different ways.

03:22 19 MR. WALDROP: Your Honor, we tender  
03:22 20 Dr. Stan McClellan as an expert in the field of  
03:23 21 electrical engineering with a specialty in  
03:23 22 communication networks.

03:23 23 MR. ROSENTHAL: We have no objection,  
03:23 24 Your Honor.

03:23 25 THE COURT: He'll be recognized as an

03:23 1 expert in those fields.

03:23 2 MR. WALDROP: Thank you, Your Honor.

03:23 3 BY MR. WALDROP:

03:23 4 Q. Now, Dr. McClellan, are you being paid for  
03:23 5 your time in this case?

03:23 6 A. Yes.

03:23 7 Q. And what is your hourly rate?

03:23 8 A. \$320 an hour.

03:23 9 Q. But an important question, Dr. McClellan, is  
03:23 10 your compensation for your work in this case based on a  
03:23 11 contingent in any way on the outcome of this case?

03:23 12 A. No.

03:23 13 Q. Is your compensation for your work in any way  
03:23 14 based on a contingent on the opinions you provide today  
03:23 15 in this case?

03:23 16 A. No.

03:23 17 Q. Now, Dr. McClellan, I want to talk to you  
03:23 18 about the accused VMware products, what we call  
03:23 19 VeloCloud or VeloCloud SD-WAN, which you found to  
03:23 20 infringe Claim 13 of the '133 patent.

03:23 21 Can we talk about that?

03:23 22 A. Yes.

03:23 23 Q. But before we do that, let's discuss the '133  
03:23 24 patent first. So, Dr. McClellan, do you recall in  
03:24 25 opening statement how I described the '133 patent?

03:24 1 A. I believe so, but it would help to refresh a  
03:24 2 little bit. I don't remember exactly what you said.

03:24 3 Q. This was the exit traffic cop.

03:24 4 Do you remember that, Dr. McClellan?

03:24 5 A. Yeah, yeah.

03:24 6 Q. Dr. McClellan, I would bring up that animation  
03:24 7 for your recollection. This is one way I tried to  
03:24 8 relate the '133 patent to everyday life. And do you  
03:24 9 recall that I thought of it as a computer traffic cop  
03:24 10 that directs traffic or packets of information to the  
03:24 11 best exits when the rows were congested?

03:24 12 Do you remember that?

03:24 13 A. Yeah.

03:24 14 Q. Can you please explain to the jury your  
03:24 15 understanding of the '133 patent?

03:24 16 A. My understanding of the '133 patent is very  
03:24 17 similar to this. The traffic cop in this case would  
03:24 18 live at node 104<sub>A</sub> on the top left. And the traffic cop  
03:24 19 would have information about the red node on the bottom  
03:24 20 right.

03:24 21 And before he would allow traffic into the  
03:24 22 network, he would make some determinations about where  
03:24 23 that traffic really needed to go and what kind of --  
03:24 24 where that traffic was supposed to go and how that  
03:25 25 traffic could go a different way. And then he would

03:25 1 enforce those determinations at node 104<sub>A</sub>.

03:25 2 So at the ingress the traffic cop would manage  
03:25 3 the traffic flow on behalf of the egress. Because the  
03:25 4 egress was comprised some way.

03:25 5 Q. Now, Dr. McClellan, I would like to talk to  
03:25 6 you about the '133 patent. Can you please tell the  
03:25 7 jury what the title of the '133 patent is?

03:25 8 A. The title of the patent is "Method and  
03:25 9 Apparatus For Preventing Congestion in Load-Balancing  
03:25 10 Networks."

03:25 11 Q. And when was the '133 patent filed,  
03:25 12 Dr. McClellan?

03:25 13 A. Looks like March 23, 2006.

03:25 14 Q. And when will the '133 patent expire?

03:25 15 A. Looks like it expires in November 2027.

03:25 16 Q. Now, what year is it, Dr. McClellan?

03:25 17 A. 2023.

03:25 18 Q. Okay. Thank you, Dr. McClellan.

03:26 19 So, Dr. McClellan, let's take a look at one of  
03:26 20 the figures which is Figure 1 of the '133 patent.

03:26 21 MR. ROSENTHAL: Your Honor, I'm sorry. I  
03:26 22 just want to make sure this slide is not shown to jury.  
03:26 23 I'm not sure if it is already. But we have an  
03:26 24 objection. The objection specifically is what's  
03:26 25 written down on the bottom right of the screen violates



03:26 1 the MIL.

03:26 2 THE COURT: Correct. I would sustain  
03:26 3 that.

03:26 4 MR. WALDROP: So, Your Honor, we'll come  
03:26 5 back to this slide. We'll come back to this.

03:26 6 A. Are we talking about slide that I'm looking  
03:26 7 at?

03:26 8 BY MR. WALDROP:

03:26 9 Q. Yeah. We'll take down that slide. We'll go  
03:26 10 back to -- we'll go to the next slide.

11 MR. WALDROP: Yeah. We'll take that --  
03:26 12 if we could -- would you remove the -- we'll just keep  
03:26 13 going.

03:26 14 So if we go back to the previous slide,  
03:26 15 Jorge, to Slide 11.

16 BY MR. WALDROP:

03:27 17 Q. Dr. McClellan, you'll see that the title talks  
03:27 18 about networks, load-balancing networks.

03:27 19 A. Yes.

03:27 20 Q. So my question as we turn -- if we move to  
03:27 21 Slide 14, please describe to the jury what is a  
03:27 22 network?

03:27 23 A. A network is a connection of nodes. In a  
03:27 24 computer network or a data network the nodes are  
03:27 25 computers or devices that interchange data. You can

03:27 1 have other kinds of networks. But in this case it's a  
03:27 2 group of interconnected nodes that can transmit,  
03:27 3 receive and exchange data, voice, video traffic and so  
03:27 4 on in the form of packets.

03:27 5 Q. And what are network communications on the  
03:27 6 next slide, Dr. McClellan?

03:27 7 A. Network -- I think we're all kind of familiar  
03:27 8 with network communications because we all probably  
03:27 9 have a home network in our house. And our TV's  
03:27 10 connected by WiFi and some sort of thing like that.

03:27 11 Networks exist in a lot of different forms,  
03:27 12 local area networks exist in a small geographic area.  
03:28 13 Wide area networks exist in a much larger geographic  
03:28 14 area and tend to interconnect local area networks or  
03:28 15 other kinds of networks. So depending on the  
03:28 16 geographic scope of a network, it's given a different  
03:28 17 name typically.

03:28 18 Q. And what is a node, Dr. McClellan?

03:28 19 A. A node is a place on that network where  
03:28 20 communication paths cross.

03:28 21 Q. And what is a packet? You might have heard me  
03:28 22 talk -- I talked to the jury in the opening about a  
03:28 23 data packet.

03:28 24 What is a packet?

03:28 25 A. A packet is a chunk of data. You generate --

03:28 1 you know, if you're having a Zoom -- a Zoom meeting  
03:28 2 with your grandma, then your video's getting -- the  
03:28 3 video that's being taken of your face and the audio  
03:28 4 that's coming out of your -- off of your voice is  
03:28 5 getting chopped up into little pieces and packaged up  
03:28 6 to be sent off to your grandma.

03:28 7 It's kind of like putting stuff in a box and  
03:28 8 then putting a label on the box so that the box can  
03:29 9 ship to grandma. The stuff that goes in the box is the  
03:29 10 data. The box is the packet and the packet has an  
03:29 11 address slapped on the outside of it that tells it how  
03:29 12 to get there.

03:29 13 Q. And what is inside a packet?

03:29 14 A. The packet -- the stuff that's inside the  
03:29 15 packet is whatever the user data is typically. Could  
03:29 16 be voice, could be video, could be e-mail. That's  
03:29 17 typically what's inside of a packet. Packets can  
03:29 18 contain all kinds of stuff though.

03:29 19 Q. Now, let's dig deeper into what a packet looks  
03:29 20 like on the next slide. Please explain to the jury --  
03:29 21 oh. You want to describe the flow of the packet  
03:29 22 information? Yeah.

03:29 23 A. This slide shows packets which are the little  
03:29 24 purple things transiting from the left-hand side to the  
03:29 25 right-hand side with a video conference.

03:29 1 So what would be inside the packets is the  
03:29 2 video that the two ladies are exchanging. And the two  
03:29 3 blue things in the middle would be some kind of network  
03:29 4 node through which the packets pass. The computers  
03:29 5 that the ladies are using on the end would also be a  
03:29 6 network.

03:29 7 Q. Dr. McClellan, hold on one second.

03:30 8 Can the jury see the screens?

03:30 9 A. Doesn't look like it. I don't see anything on  
03:30 10 their screens. That's been the case for several  
03:30 11 minutes.

03:30 12 MR. WALDROP: But these are  
03:30 13 demonstratives, Your Honor. There're no exhibits  
03:30 14 attached to these. These are demonstratives.

03:30 15 THE COURT: Okay. You need to let -- you  
03:30 16 need to show them -- you need to hit the button and  
03:30 17 show them what's on your screen even if they're  
03:30 18 demonstratives. That gives the other side an  
03:30 19 opportunity to object before the jury sees it.

03:30 20 MR. WALDROP: Can the jury see -- can  
03:30 21 they see it now?

03:30 22 Can you see it now?

03:30 23 (Off-the-record discussion.)

03:30 24 BY MR. WALDROP:

03:30 25 Q. Okay. So I'll ask the question again. If you

03:30 1 could describe what's going on in this slide,  
03:31 2 Dr. McClellan.

03:31 3 A. Well, I'll keep an eye on those too.

03:31 4 What's going on in this slide is you got two  
03:31 5 ladies that are having a video conference. And the  
03:31 6 animation shows little purple things going from left to  
03:31 7 right. And the little purple things are the packets.  
03:31 8 So the packets contain the video and the audio that one  
03:31 9 person is generating. And they're taking -- the  
03:31 10 packets are taking that data to the other side.

03:31 11 Q. Now, you talked about what's inside a packet.  
03:31 12 What is inside of a packet, Dr. McClellan?

03:31 13 A. The packet contains whatever the data is that  
03:31 14 needs to be sent to the other side.

03:31 15 Q. And you can see that slide. Are you able to  
03:31 16 see that slide? Thank you.

03:31 17 Please continue, Dr. McClellan.

03:31 18 A. So the data that's inside the packet is  
03:31 19 typically called a "payload." That's the thing you're  
03:31 20 trying to send to your grandma.

03:31 21 The packet is the box that you're putting it  
03:31 22 in and the headers that are shown here in blue are the  
03:31 23 addressing information that helps it get to your  
03:31 24 grandma.

03:31 25 Q. Now, Dr. McClellan, you heard me talk before

03:31 1 in the opening about how packets can create traffic.

03:32 2 Please explain to the jury how that happens.

03:32 3 A. Well, packets transit the network and the  
03:32 4 packets come from all different types of places and  
03:32 5 they're going to all different types of places. And so  
03:32 6 that creates traffic on the network with all the  
03:32 7 packets kind of jumbled together, kind of like cars on  
03:32 8 a freeway.

03:32 9 And packets have different sizes, kind of like  
03:32 10 cars and trucks on a freeway and motorcycles and stuff  
03:32 11 like that.

03:32 12 And so all of that stuff mixed together all at  
03:32 13 the same time trying to move across the network is just  
03:32 14 like cars, for example, on I-35. It can get jammed up.  
03:32 15 Lots more traffic means lots more load on the network.  
03:32 16 And I think we're all familiar with what happens around  
03:32 17 here on I-35 around Thanksgiving.

03:32 18 That's congestion. Too much traffic causes  
03:32 19 traffic jams. And we see that on all freeways, right?  
03:32 20 Big networks are no different.

03:32 21 Q. And what happens if too many packets are  
03:33 22 moving across the network?

03:33 23 A. It causes problems. You get traffic jams. It  
03:33 24 causes delays. It reduces the performance of the  
03:33 25 network, which in turn reduces the performance of the

03:33 1 applications that the people are using for the  
03:33 2 purpose -- on the network. And the network efficiency  
03:33 3 goes down, and it's just a problem all the way around.

03:33 4 Q. And so how do you prevent a network from being  
03:33 5 overloaded or congested, Dr. McClellan?

03:33 6 A. There's a lot of different ways to prevent the  
03:33 7 network from being overloaded. One way is to introduce  
03:33 8 a traffic cop, and you can decide where you want to put  
03:33 9 the traffic cop. You can put the traffic cop in a lot  
03:33 10 of different places.

03:33 11 The typical approach is to put the traffic cop  
03:33 12 near the beginning where the packets are entering the  
03:33 13 network, because that's the most logical place to slow  
03:33 14 down the flow.

03:33 15 That's called the ingress point. And there's  
03:33 16 lots of different ingress points, so then you have lots  
03:33 17 of different traffic cops all around at the different  
03:34 18 ingress points trying to slow down the traffic that's  
03:34 19 entering the network.

03:34 20 Load-balancing also prevents network overload.  
03:34 21 Load-balancing is a form of sort of cooperative  
03:34 22 operation of devices in the network to try to equalize  
03:34 23 the load and more efficiently allocate the available  
03:34 24 space on the network with the packets that are trying  
03:34 25 to pass through the network.

03:34 1 It avoids overloading certain places while  
03:34 2 other places are not loaded at all, for example.

03:34 3 Q. Now, Dr. McClellan, I want you -- thank you  
03:34 4 for explaining some of those terms regarding  
03:34 5 load-balancing. Let's discuss now some of the  
03:34 6 background on load-balancing networks to provide the  
03:34 7 jury some context.

03:34 8 Please describe what was going on with  
03:34 9 load-balancing networks before the invention of the  
03:34 10 '133 patent.

03:34 11 A. Load-balancing is a really broad term.  
03:34 12 Load-balancing networks and subnetworks have been used  
03:34 13 in a lot of different types of applications. Typically  
03:35 14 when traffic enters a network, it really doesn't  
03:35 15 understand what's going on in the rest of the network  
03:35 16 because the traffic doesn't have any way to sense  
03:35 17 what's happening inside the network. The traffic is  
03:35 18 just moving through the network.

03:35 19 And so the main way to control that kind of a  
03:35 20 thing is to stop the traffic from entering the network  
03:35 21 when the network starts to get overloaded.

03:35 22 If the network starts to get overloaded, you  
03:35 23 slow the traffic down, the congestion eases and the  
03:35 24 network starts to function again, and then you let the  
03:35 25 traffic go through again.



03:35 1 So you stop the path -- stop the packets from  
03:35 2 ingressing or you slow down the packets from ingressing  
03:35 3 regardless of what kind of packets they are.

03:35 4 And you have no concept of what's going on in  
03:35 5 the inside of the network and particularly not at the  
03:35 6 far side of the network where the packets are trying to  
03:35 7 reach.

03:35 8 Q. Has load-balancing changed over time,  
03:35 9 Dr. McClellan?

03:35 10 A. Yeah. Load-balancing in modern networks is  
03:36 11 usually important. As more applications come online  
03:36 12 that nobody envisioned, you know, TikTok, Facebook,  
03:36 13 more data traffic is generated and more congestion  
03:36 14 happens. And the load has to be balanced somehow.

03:36 15 And so load-balancing before the '133 patent  
03:36 16 worked in a lot of ways, in many cases, like what you  
03:36 17 see on the screen here with an ingress flow -- ingress  
03:36 18 flow limiting.

03:36 19 The left-hand side shows the car stopped at  
03:36 20 the light. And the -- and when the light turns green,  
03:36 21 a certain number of cars can go. And when the light  
03:36 22 turns red, the cars that are on the on-ramp have to  
03:36 23 stop. That's ingress flow limiting.

03:36 24 And that's one way to deal with -- before the  
03:36 25 '133 patent, that's -- or older ways of load-balancing,

03:36 1 that was one way to deal with the ingress flow.

03:36 2 Q. Now, Dr. McClellan, what are some of the  
03:36 3 disadvantages or limitations of these prior  
03:37 4 load-balancing networks?

03:37 5 A. Well, a load-balancing network that doesn't do  
03:37 6 an effective job can often create worse problems than  
03:37 7 it's trying to solve.

03:37 8 If the load-balancing network does a good job,  
03:37 9 then the load is balanced, the network works and  
03:37 10 everybody's happy.

03:37 11 But if it doesn't do a good job and that job  
03:37 12 is not done well for certain people on the network or  
03:37 13 for certain applications on the network, then data can  
03:37 14 get lost, application performance can be degraded,  
03:37 15 connections can get blocked and that can happen in  
03:37 16 different ways at different times.

03:37 17 Q. Now, Dr. McClellan --

03:38 18 MR. WALDROP: Hold on one second, Your  
03:38 19 Honor.

03:38 20 (Conference between counsel.)

03:38 21 BY MR. WALDROP:

03:38 22 Q. So, Dr. McClellan, before we proceed further,  
03:38 23 I wanted to make sure that we talked about a few things  
03:38 24 before we kind of jumped into this. And I want this to  
03:38 25 be a moment to give the jury some perspective on the

03:38 1 technology and how it relates to everyday life.

03:38 2 A. Okay.

03:38 3 Q. Let's assume, Dr. McClellan, that you are  
03:38 4 sitting in your room, as you heard, or in your home and  
03:39 5 you have your mobile device or your computer and you  
03:39 6 want to interact with one of these video-conferencing  
03:39 7 services that I talked about in the opening.

03:39 8 Please explain to the jury how important this  
03:39 9 technology is in terms of how they interact with it as  
03:39 10 they're sitting at home on their mobile device or their  
03:39 11 computer.

03:39 12 A. I think it's pretty clear to everybody that  
03:39 13 today's modern society functions on networks and  
03:39 14 interchange of data.

03:39 15 You know, I can't even imagine -- there's kids  
03:39 16 growing up today that don't even know what a dial-up  
03:39 17 modem is or was because broadband always on has become  
03:39 18 so ubiquitous.

03:39 19 And those of us who know what the sound of a  
03:39 20 modem dial-up is understand that fat pipes and fast  
03:39 21 data is the game. It's very important to us.

03:39 22 When I get on Amazon with my opposable thumbs  
03:39 23 on my little mobile phone, I'm generating enormous  
03:40 24 amounts of data and I want that thing to be delivered  
03:40 25 tomorrow. And the only way that thing can be delivered

03:40 1 tomorrow is if I can make that purchase right now.

03:40 2 And so it doesn't matter how fast I move my  
03:40 3 little opposable thumbs. If that network is congested  
03:40 4 and that network doesn't work right, I don't get my  
03:40 5 toothbrush tomorrow from Amazon.

03:40 6 And that's a problem. It's a problem for  
03:40 7 Amazon because they don't make money. It's a problem  
03:40 8 for me because I didn't get my toothbrush. It's a  
03:40 9 problem for the Amazon driver because he might not get  
03:40 10 paid. It's a problem for the Amazon driver that comes  
03:40 11 to my house because I put chips out there for them and  
03:40 12 they can pick them up so they make them happy, you  
03:40 13 know, and stuff like that.

03:40 14 So if the network doesn't work today, society  
03:40 15 basically stops. So this is important stuff. And it's  
03:40 16 not just entertainment stuff. It's  
03:40 17 business-to-business stuff. Businesses exchange data  
03:40 18 all the time. And the data that they exchange is worth  
03:41 19 more than my Amazon toothbrush. And if the network  
03:41 20 stops for that, that's a real problem.

03:41 21 Q. Are you familiar with remote surgery,  
03:41 22 Dr. McClellan?

03:41 23 A. Yes. I am. I actually designed a remote  
03:41 24 interoperative surgical system in the late 1990s. It  
03:41 25 was the first instance of something like that.

03:41 1 Surgeons, when you -- when you have surgery --

03:41 2 MR. ROSENTHAL: Your Honor, I really do  
03:41 3 hate to object. This is well outside the scope.

03:41 4 MR. WALDROP: We can take this off, Your  
03:41 5 Honor.

03:41 6 THE COURT: Okay.

03:41 7 MR. WALDROP: Your Honor, Dr. McClellan's  
03:41 8 testifying about the importance of the invention, Your  
03:41 9 Honor.

03:41 10 You said sustained, Your Honor? I  
03:41 11 couldn't hear.

03:41 12 THE COURT: I think he is wandering a  
03:41 13 little far afield in that technology.

03:41 14 MR. WALDROP: Okay. I was going to just  
03:41 15 bring it together, Your Honor.

03:41 16 THE COURT: Okay. Why don't you do that?

03:41 17 MR. WALDROP: If I could just wrap it up  
03:42 18 right quick, Your Honor.

03:42 19 THE COURT: Yes.

03:42 20 BY MR. WALDROP:

03:42 21 Q. So you've heard about remote surgery, right,  
03:42 22 Dr. McClellan?

03:42 23 A. Absolutely.

03:42 24 Q. And is that technology provided over networks?

03:42 25 A. Absolutely.

03:42 1 Q. What happens if there's a congested node or  
03:42 2 congested network in remote surgery as your physician  
03:42 3 is working on you remotely?

03:42 4 A. That can create some serious problems in the  
03:42 5 surgery.

03:42 6 Q. Now, load-balancing networks, which is what  
03:42 7 we're talking about, how important that is and the '133  
03:42 8 patent.

03:42 9 What is a load-balancing network,  
03:42 10 Dr. McClellan? Does the '133 patent tell you about  
03:42 11 that?

03:42 12 A. Yeah. The load-balancing network that we see  
03:42 13 here is the picture from the '133 patent, where you see  
03:42 14 the square with the four squares in the corners.

03:42 15 The four squares in the corners are the nodes  
03:42 16 of the load-balancing network, and the load-balancing  
03:42 17 network interconnects the sort of cloud-shaped things  
03:42 18 that are outside of the load-balancing network, Network  
03:42 19 A, B, C, D.

03:43 20 And the load-balancing network's job is to  
03:43 21 make sure that traffic that passes between these  
03:43 22 external networks is -- passes in an efficient fashion  
03:43 23 and it doesn't get all clogged up in one side of the  
03:43 24 network while the other side of the network is free so  
03:43 25 that all of the networks work more effectively.

1 MR. WALDROP: So I just want to make sure  
2 we orient --

03:43 3 And, jury, can you see the slide?

4 BY MR. WALDROP:

03:43 5 Q. So I want to make sure we orient them,  
03:43 6 Dr. McClellan. So on the left this is a figure, right?  
03:43 7 That's a figure from the patent that you annotated,  
03:43 8 right, Dr. McClellan?

03:43 9 A. That's directly from the patent with a little  
03:43 10 bit of darker lines on there.

03:43 11 Q. And on the right is some language from the  
03:43 12 patent describing load-balancing networks, right,  
03:43 13 Dr. McClellan?

03:43 14 A. Right. Highlighted on the right is language  
03:43 15 from the patent that says: Load-balancing networks are  
03:43 16 generally deployed for exchanging traffic between  
03:43 17 networks in a manner for handling dynamic traffic  
03:43 18 loads.

03:43 19 Q. Okay. So first of all, before we go further,  
03:43 20 orient the jury in terms of the figure on the left.

03:43 21 What are they seeing here? What's going on in  
03:44 22 the figure?

03:44 23 A. So traffic is -- on the figure on the left  
03:44 24 traffic is passing from each cloud network on the  
03:44 25 corners to all the other cloud networks on the other

03:44 1 corners. So the -- in particular on the top left  
03:44 2 corner there's a computer at Network A. And that  
03:44 3 computer may be talking to the computer on the other  
03:44 4 corner at Network B.

03:44 5 Q. And I see --

03:44 6 A. In that case the traffic from Network A goes  
03:44 7 into the ingress node and it passes through the  
03:44 8 load-balancing network. And then it comes out of the  
03:44 9 load-balancing node at the egress node so it can get to  
03:44 10 the computer on Network D.

03:44 11 Q. Thank you, Dr. McClellan.

03:44 12 And on the right is the specification for the  
03:44 13 '133 describing that, those nodes?

03:44 14 A. That's right.

03:44 15 Q. So next, Dr. McClellan, what else does the  
03:44 16 '133 patent talk about load-balancing?

03:44 17 A. In the summary of the invention it talks about  
03:44 18 the method that's provided in the -- in the invention.

03:44 19 And the method includes determining an egress  
03:44 20 node associated with -- and I'm going to skip some of  
03:45 21 the words -- determining an egress node associated with  
03:45 22 packets that are coming in the ingress node and  
03:45 23 determining for each packet whether a congestion exists  
03:45 24 at the egress node.

03:45 25 So if the traffic cop is sitting at the



03:45 1 ingress node, and the traffic cop magically has some  
03:45 2 concept of what's happening at the egress node, and in  
03:45 3 the magic of understanding what's happening at the  
03:45 4 egress node he does something different with the  
03:45 5 packets that are coming in at the ingress node.

03:45 6 And it's kind of like -- it's kind of like if  
03:45 7 you're trying to get on the freeway, you're trying to  
03:45 8 go on the on-ramp on the freeway and you were going to  
03:45 9 go a few exits down. But there's a wreck a few exits  
03:45 10 down. If you didn't know there was a wreck a few exits  
03:45 11 down, you might get on the freeway and get stuck. But  
03:45 12 if you knew there was a wreck a few exits down, you  
03:45 13 might take a different route. It's the same sort of  
03:45 14 idea.

03:45 15 Q. So just so we're clear, the ingress node,  
03:45 16 Dr. McClellan, that's on the top left here, the figure  
03:45 17 on the left, right?

03:45 18 A. Yeah. The ingress services Network A.

03:46 19 Q. And that's entrance -- can we call that the  
03:46 20 entrance node? Right?

03:46 21 A. That's the on-ramp.

03:46 22 Q. On-ramp node. Thank you, the on-ramp.

03:46 23 And at the bottom is the egress node, right?

03:46 24 A. That's the off-ramp.

03:46 25 Q. Thank you.

03:46 1 And, Dr. McClellan, we went over that  
03:46 2 load-balancing was like before the '133 patent. And we  
03:46 3 then went over what the '133 patent says about  
03:46 4 load-balancing.

03:46 5 What does the '133 invent then?

03:46 6 MR. WALDROP: And, you know, Your Honor,  
03:46 7 we may need to approach here on this issue, Your Honor.  
03:46 8 The next slide. But I'll publish it to -- can we --  
03:46 9 next slide.

10 BY MR. WALDROP:

03:46 11 Q. Go ahead.

03:46 12 A. You want me to go ahead?

03:46 13 Q. Yes.

03:46 14 MR. ROSENTHAL: Your Honor, we do object.  
03:46 15 This shouldn't be shown. This is -- the objection  
03:46 16 specifically is this figure is not discussed in  
03:46 17 Dr. McClellan's report.

03:46 18 MR. WALDROP: It is, Your Honor.

03:46 19 THE COURT: Where at?

03:46 20 MR. WALDROP: It's in -- it's on  
03:46 21 Paragraph 91, Your Honor. Page 45 of Dr. McClellan's  
03:47 22 report, Paragraph 91. And it cites to Slides 105 to  
03:47 23 126, Your Honor.

03:47 24 And this is a document provided to us --  
03:47 25 the flashing part is the document provided to us by

03:47 1 VMware, Your Honor. In native and in black and white  
03:47 2 copy.

03:47 3 If we may approach, Your Honor?

03:47 4 THE COURT: Do you have a response?

03:47 5 MR. ROSENTHAL: Yes, Your Honor. He  
03:47 6 never discusses this figure. He has a citation to a  
03:47 7 range of pages. He doesn't do any analysis of this  
03:47 8 figure.

03:47 9 MR. WALDROP: That's all we need, Your  
03:47 10 Honor, is disclosure of this document.

03:47 11 THE COURT: Sustained.

03:47 12 MR. WALDROP: Your Honor, he does discuss  
03:47 13 the analysis of it, Your Honor. May we approach, Your  
03:47 14 Honor? This is an important issue.

03:47 15 THE COURT: Sure.

03:47 16 (Bench conference.)

03:48 17 MR. WALDROP: Paragraph 91.

03:48 18 THE COURT: (Indiscernible).

03:48 19 MR. WALDROP: I have --

03:48 20 THE COURT: Tell me whose expert this is.

03:48 21 MR. WALDROP: Infringement report,  
03:48 22 Dr. McClellan.

03:48 23 THE COURT: Okay. The first infringement  
03:48 24 report?

03:48 25 MR. WALDROP: Yes, sir. So it's

03:48 1 Paragraph 91. He cites to the pages of which this is  
03:48 2 included and just discussing the DMPO feature which is  
03:48 3 the accused feature in this -- in this case, Your  
03:48 4 Honor.

03:48 5 THE COURT: And the slide that I'm  
03:48 6 looking at, Slide 27, is one of the slides that he  
03:48 7 uses --

03:48 8 MR. WALDROP: Yes, Your Honor.

03:48 9 MR. ROSENTHAL: Your Honor, he doesn't  
03:48 10 make any analysis. The figure doesn't appear. It's  
03:48 11 throughout his slide projection and not once does he  
03:48 12 address it.

03:48 13 THE COURT: Okay. I got it. So what  
03:48 14 is -- what are you -- assuming he can -- assuming he  
03:48 15 can show the slide because it's in here, what do you  
03:48 16 intend to ask him?

03:48 17 MR. WALDROP: Your Honor, I'm going to  
03:48 18 ask him about whether or not this is a VeloCloud  
03:48 19 product. I'm going to ask him about whether it's a  
03:49 20 VeloCloud, whether it's an accused product, right?

03:49 21 THE COURT: And where's that in here?

03:49 22 MR. WALDROP: Huh? Oh, in the DMPO  
03:49 23 feature. This is an accused feature. DMPO's an  
03:49 24 accused feature, Your Honor, of the patent -- of the  
03:49 25 product.

03:49 1 THE COURT: Okay. This says: Further,  
03:49 2 DMP dynamically --

3 MR. WALDROP: Yes.

03:49 4 THE COURT: -- route data. I think it  
03:49 5 should be "routes." Dynamically routes data based on  
03:49 6 type of data and path performance, routing traffic in a  
03:49 7 load-balancing network.

03:49 8 MR. WALDROP: Yeah. Yes, sir. That's  
03:49 9 what we're talking about.

03:49 10 THE COURT: And so in -- this footnote is  
03:49 11 down here, C, so the Paragraph 91 is what you want him  
03:49 12 to say?

03:49 13 MR. WALDROP: Yes, Your Honor. We're  
03:49 14 talking about load-balancing networks right now, Your  
03:49 15 Honor. That's why this is important.

03:49 16 THE COURT: Well --

03:49 17 MR. WALDROP: How to route traffic.

03:49 18 THE COURT: This doesn't say anything --  
03:49 19 this doesn't say anything that I see. Tell me what  
03:49 20 DMPO is.

03:49 21 MR. WALDROP: Dynamic multipath  
03:50 22 optimization. Yes, sir.

03:50 23 THE COURT: I'm saying that's not a  
03:50 24 product.

03:50 25 MR. WALDROP: It's an accused feature,

1 yes.

2 MR. ROSENTHAL: It's a feature of a  
3 product.

03:50 4 MR. WALDROP: That we're accusing.

03:50 5 THE COURT: So the feature, DMPO,  
03:50 6 dynamically routes data based on type of data and path  
03:50 7 performance routing traffic. And that's what you want  
03:50 8 him to say?

03:50 9 MR. WALDROP: And things like that.

03:50 10 THE COURT: No, no, no. Not things like  
03:50 11 that. He can say that. And that's supported by this.  
03:50 12 What else do you want him to say? Beyond  
03:50 13 what's here?

03:50 14 MR. WALDROP: And that the figure -- that  
03:50 15 this -- that this is one of the accused products in  
03:50 16 this case.

03:50 17 THE COURT: This? I'm looking at on the  
03:50 18 screen?

03:50 19 MR. WALDROP: No, not this. The -- he  
03:50 20 can bring it up to me. This figure -- this figure --  
03:50 21 this figure is an accused product.

03:50 22 THE COURT: To be perfectly clear, by  
03:50 23 this figure, you're looking at Page 110 of what  
03:50 24 VMware -- what is this you're holding right here?

03:50 25 MR. WALDROP: So Paragraph 91, Your

03:50 1 Honor, cites to -- this Paragraph 91 of Dr. McClellan's  
03:50 2 report cites to these collection of documents from  
03:51 3 one -- Pages 105 to 126. I am showing you the specific  
03:51 4 page that we're referring to that that is cited to. It  
03:51 5 is a VMware document talking about one of the accused  
03:51 6 products in this case.

03:51 7 THE COURT: Where does he say in the  
03:51 8 report what he wants to say about this Slide 110 which  
03:51 9 is -- I admit I have Paragraph 91 says DMPO dynamically  
03:51 10 routes -- he can say that.

11 MR. WALDROP: Yes. Yes.

03:51 12 THE COURT: And then down here I have  
03:51 13 "see" and a range of slides. And it has this slide.  
03:51 14 But now where in the report does it say anything else  
03:51 15 that you want him to say about this slide?

03:51 16 Do you just want him to say what's on the  
03:51 17 slide? Or are you going to ask him for an opinion  
03:51 18 about what's on the slide?

03:51 19 MR. WALDROP: Yeah. Your Honor, I want  
03:51 20 him -- I want him to say, which is accurate, which is  
03:51 21 that this is an accused product. This is --

03:52 22 THE COURT: Well, he doesn't say that in  
03:52 23 here.

03:52 24 MR. WALDROP: Well, this is VeloCloud.

03:52 25 THE COURT: But he doesn't say --

03:52 1 MR. WALDROP: He just said this is --

03:52 2 THE COURT: No. But he says that's how  
03:52 3 this works.

03:52 4 MR. WALDROP: But DMPO is VeloCloud.

5 THE COURT: No. DMPO is --

03:52 6 MR. WALDROP: SD-WAN. That's part of the  
03:52 7 accused product.

03:52 8 THE COURT: It's a feature of that. And  
03:52 9 he can say this. He can say that it has this feature  
03:52 10 that you have in here.

03:52 11 What I'm trying to say is, where does he,  
03:52 12 in his report, discuss what's on this Page 110 that is  
03:52 13 cited in your report on 45? Where does he say what you  
03:52 14 want him to say about what's in the page in his report?  
03:52 15 That's what I need.

03:52 16 MR. WALDROP: This is the only -- this is  
03:52 17 the citation to the --

03:52 18 Your Honor, this is the only citation in  
03:52 19 the report to this figure, Your Honor.

03:52 20 THE COURT: Okay. And he can --

03:52 21 MR. WALDROP: So can I put this  
03:52 22 document in front of him?

03:52 23 THE COURT: He can show the figure.

03:53 24 MR. WALDROP: Yeah. Okay. Thank you.

03:53 25 THE COURT: No. You can show the figure.



03:53 1 MR. ROSENTHAL: Your Honor, the very next  
03:53 2 slide, he goes on to compare the figure to Figure 1 of  
03:53 3 the patent.

03:53 4 THE COURT: Well, he can show the figure,  
03:53 5 but he can't compare it to what's in the patent unless  
03:53 6 you show me where in the report he does that. That's  
03:53 7 what I'm trying to say.

03:53 8 He has to say in the report where he has  
03:53 9 disclosed in the report how what's on Page 110 -- he  
03:53 10 has to put his opinion in here.

03:53 11 He can show that slide because he's  
03:53 12 disclosed it here and he can testify about what's in  
03:53 13 Paragraph 91, but if you can show me where in his  
03:53 14 report he explains anything about DMPO and tethers it  
03:53 15 to this slide in any way, then he can talk about that.  
03:53 16 But I don't see -- show me where in the report he does  
03:53 17 that.

03:53 18 MR. WALDROP: He doesn't, Your Honor.

03:54 19 This is the only citation, Your Honor. But he --

03:54 20 THE COURT: Then this is all he gets to  
03:54 21 say --

03:54 22 MR. WALDROP: But he -- it is an accused  
03:54 23 product, Your Honor, and it is VeloCloud --

03:54 24 THE COURT: But he doesn't -- I'm going  
03:54 25 to say it the last time.

03:54 1 MR. WALDROP: Okay, Your Honor. I  
03:54 2 understand.

03:54 3 THE COURT: See, this feature does X in  
03:54 4 Paragraph 91.

03:54 5 MR. WALDROP: Yeah.

03:54 6 THE COURT: See VMware disclosures below.

03:54 7 MR. WALDROP: Yeah.

03:54 8 THE COURT: And it's saying that it  
03:54 9 describes this, that it has this feature.

10 MR. WALDROP: Okay.

03:54 11 THE COURT: I get that.

03:54 12 MR. WALDROP: Yes.

03:54 13 THE COURT: That's what this says.

03:54 14 MR. WALDROP: Okay.

03:54 15 THE COURT: But that's all he gets to  
03:54 16 say.

03:54 17 MR. WALDROP: Okay. I understand.

03:54 18 THE COURT: He doesn't anywhere -- unless  
03:54 19 you can tell me, he doesn't anywhere in here disclose  
03:54 20 the opinion about why what we --

03:54 21 MR. WALDROP: Okay. That's fine, Your  
03:54 22 Honor. Thank you, Your Honor.

03:54 23 (Bench conference concludes.)

03:55 24 MR. WALDROP: Can the jury -- can you see  
03:55 25 it now?

03:55 1 (Off-the-record discussion.)

03:55 2 MR. WALDROP: Can the jury now see the  
03:55 3 slide? Can you see it now? Can you see it now?

03:56 4 BY MR. WALDROP:

03:56 5 Q. Okay. Good.

03:56 6 So, Dr. McClellan, on this slide -- I'm going  
03:56 7 to reorient everyone, Dr. McClellan, what's on Slide  
03:56 8 27. We had a little break there.

03:56 9 Dr. McClellan, on this slide, what is -- what  
03:56 10 is on the left at the bottom?

03:56 11 Is -- there seems to be a device. What is  
03:56 12 that?

03:56 13 A. At the bottom of the slide, on the left-hand  
03:56 14 side, is one of the VeloCloud devices. It's a network  
03:56 15 appliance.

03:56 16 Q. And is that one of the accused products that  
03:56 17 infringe -- that you opine infringes the '133 patent?

03:56 18 A. Now, that's either Edge or a Gateway device  
03:57 19 that infringes. Yes.

03:57 20 Q. Now, describe to the jury what is above that  
03:57 21 in the figure and off to the right.

03:57 22 A. So the figure above that -- the square above  
03:57 23 that with the squares in the corners is a  
03:57 24 load-balancing network as described in the patent. And  
03:57 25 the squares on the corner, the dark black squares on

03:57 1 the ingress and egress nodes of the load-balancing  
03:57 2 network.

03:57 3 Q. And what does the patent say regarding what  
03:57 4 they're seeing on the left -- on the right of Slide 27,  
03:57 5 Dr. McClellan?

03:57 6 A. Well, the patent says that although this is  
03:57 7 described in a certain way, it can have different types  
03:57 8 of constructions basically.

03:57 9 And then the rest of the highlighted words of  
03:57 10 the patent talk about the fact that the lines that kind  
03:57 11 of interconnect to the nodes can have different forms.

03:57 12 Q. Now, for purposes of what we're about to  
13 continue to do, you understand that when I use the term  
03:57 14 "VeloCloud," I'm referring to the VMware Edge and  
03:58 15 Gateway devices, right?

03:58 16 A. Right. It's the little device on the bottom  
03:58 17 left.

03:58 18 Q. And you concluded that VeloCloud, that device  
03:58 19 on the -- down at the bottom, infringes Claim 13 of the  
03:58 20 '133 patent, right?

03:58 21 A. Yes.

03:58 22 Q. Now, can you provide some real-world examples  
03:58 23 to us of how knowing the congestion condition at the  
03:58 24 egress node will help efficiently process packets?

03:58 25 A. Well, the -- previously, you know, the egress

03:58 1 node status wasn't directly known by the ingress node.  
03:58 2 And so what the patent describes is some information  
03:58 3 being passed from the egress node to the ingress node  
03:58 4 and the ingress node using that information to make a  
03:58 5 determination about what to do with subsequent packets.

03:58 6 In this diagram here, we see that the node on  
03:58 7 the bottom right has congestion, whereas the nodes on  
03:58 8 the top right and the bottom left have no congestion.

03:58 9 So while the congestion condition exists at  
03:58 10 the egress node, packets may be rerouted around that  
03:59 11 congestion condition.

03:59 12 Q. Now, the '133 patent summary indicated that  
03:59 13 packets can be dropped at the ingress node or the  
03:59 14 on-ramp.

03:59 15 Can you explain how this efficiently processes  
03:59 16 packets, Dr. McClellan?

03:59 17 A. Well, dropping packets just means that they  
03:59 18 have to be retransmitted. They just kind of disappear.  
03:59 19 And so it's easier to drop the packet before it gets  
03:59 20 into the node -- into the load-balancing network than  
03:59 21 once it gets inside.

03:59 22 Q. And why is that a problem?

03:59 23 A. Because once you've let the packet inside the  
03:59 24 load-balancing network, it contribute -- it may  
03:59 25 contribute to the congestion itself.

03:59 1 Q. Now, Dr. McClellan, we just walked through the  
03:59 2 '133 patent generally and the problems that it  
03:59 3 addressed -- the technical problems that it resolved  
03:59 4 with load-balancing.

03:59 5 Dr. McClellan, now I want to talk to you about  
03:59 6 VeloCloud, which is the accused VMware product, which  
03:59 7 you concluded infringes Claim 13 of the '133 patent.

03:59 8 Can we do that?

03:59 9 A. Sure.

03:59 10 Q. Now, Dr. McClellan, can you describe the  
04:00 11 VMware products that Brazos has -- accuses of  
04:00 12 infringement of Claim 13 of the '133 patent?

04:00 13 A. Well, the VeloCloud -- as we saw in the  
04:00 14 previous slide, the VeloCloud devices are little  
04:00 15 network appliances. So it's a collection of hardware  
04:00 16 and software and applications that are kind of  
04:00 17 shrinkwrapped together.

04:00 18 So the VeloCloud, they call it the  
04:00 19 cloud-delivered SD-WAN solution. And it basically  
04:00 20 builds an overlay network that consists of tunnels.  
04:00 21 And it monitors those tunnels and it adapts to changes  
04:00 22 in the network by providing feedback on those tunnels  
04:00 23 so that it can basically become the traffic cop.

04:00 24 Q. Now, Dr. McClellan, you were here for opening,  
04:00 25 right, Dr. McClellan?

04:00 1 A. Yes.

04:00 2 Q. And you heard VMware's counsel say that they  
04:00 3 don't make hardware.

04:00 4 Did you hear that? Did you hear that?

04:00 5 A. Yes.

04:00 6 Q. Does the VeloCloud product include hardware?

04:01 7 A. Yes.

04:01 8 Q. And software?

04:01 9 A. Yes.

04:01 10 Q. And please explain to the jury why does --

04:01 11 THE COURT: Counsel, why don't you come  
04:01 12 up here for just a second?

04:01 13 (Bench conference.)

04:01 14 MR. WALDROP: Yes, sir.

04:01 15 THE COURT: I think that you just went  
04:01 16 into the area that we spent all morning saying you  
04:01 17 would not go into.

04:01 18 MR. WALDROP: No, no, no, no, Your Honor.

04:01 19 No, Your Honor. See, this is the point where I think  
04:01 20 there's confusion, Your Honor, is that VeloCloud --  
04:01 21 this product actually contains hardware and software.

04:01 22 And so I want to make sure that the jury  
04:01 23 understands that this includes hardware and software.

04:01 24 MR. ROSENTHAL: Your Honor, this is  
04:01 25 summoning confusion like nothing else.

04:02 1 MR. WALDROP: I do --

04:02 2 MR. ROSENTHAL: Can I --

04:02 3 THE COURT: Let Mr. Rosenthal finish.

04:02 4 MR. ROSENTHAL: What I said in opening  
04:02 5 was that we do not sell hardware with vSphere and that  
04:02 6 those claims require an apparatus. Those patents have  
04:02 7 now been dropped.

04:02 8 And so now for Counsel to talk about  
04:02 9 those statements where I was talking about different  
04:02 10 patents couldn't be more confusing.

04:02 11 THE COURT: Correct. That's what I  
04:02 12 thought as well. Those -- I've already told the jury  
04:02 13 to disregard anything they heard in opening argument  
04:02 14 about those patents.

04:02 15 These statements are -- you cannot go  
04:02 16 into it. You -- those patents are gone. Under 401,  
04:02 17 it's not admissible. It's not relevant.

04:02 18 MR. WALDROP: Your Honor, Your Honor,  
04:02 19 Your Honor, I was trying to make sure, Your Honor,  
04:02 20 that -- I'm not bringing up what the -- I'm only saying  
04:02 21 that this is --

04:02 22 THE COURT: You tethered it to what he  
04:02 23 said in opening arguments.

04:02 24 MR. WALDROP: Yes, Your Honor. Because  
04:02 25 on Thursday at jury selection, they were saying that



04:02 1 they don't make hardware. They specifically said to  
04:02 2 the jurors that they don't make hardware. This was a  
04:03 3 statement that was said at jury selection.

04:03 4 MR. ROSENTHAL: We don't make hardware  
04:03 5 with the vSphere products. It's not in this --

04:03 6 MR. WALDROP: That's what I'm saying. I  
7 think the confusion is --

8 (Simultaneous speakers.)

04:03 9 (Clarification by Reporter.)

04:03 10 MR. ROSENTHAL: And I said this morning  
04:03 11 the only exception to that is VeloCloud. We do make  
04:03 12 hardware with VeloCloud. I was very clear about that.

04:03 13 Now what Counsel's trying to do is make  
04:03 14 me look like a liar --

15 MR. WALDROP: No. I am not, Your Honor.

04:03 16 MR. ROSENTHAL: -- when I said something  
04:03 17 exactly accurate about products that are not in the  
04:03 18 case anymore.

04:03 19 THE COURT: Counsel?

04:03 20 MR. WALDROP: Your Honor --

04:03 21 THE COURT: Here's the problem. You're  
04:03 22 not accurately framing the question for this witness.

04:03 23 MR. WALDROP: So can I reframe the  
04:03 24 question then, Your Honor, that will make it  
04:03 25 acceptable?

04:03 1 THE COURT: You need to stay away from --  
04:03 2 I understand for the theater purposes you want to  
04:03 3 say -- and I know you well enough to know that you  
04:03 4 wouldn't accuse Mr. Rosenthal or anyone of lying, but  
04:04 5 the only reason you would say this is what the other  
04:04 6 side said and then have this person say he's wrong is  
04:04 7 to tell the jury that he's wrong.

04:04 8 And so if you're going to -- I would,  
04:04 9 number one, stay away from it. But if you're going to  
04:04 10 discuss in front of the jury with the witness what  
04:04 11 opposing counsel said, you better -- you had better  
04:04 12 accurately quote what he said.

04:04 13 MR. WALDROP: Yes, sir. I understand.

04:04 14 THE COURT: That's why I looked up when  
04:04 15 you said that, because that's not what I heard during  
04:04 16 opening argument.

04:04 17 MR. WALDROP: Your Honor --

04:04 18 THE COURT: What you said he said was not  
04:04 19 what he said. And I'm not going to have the jury have  
04:04 20 him -- to do a back and forth of you saying something  
04:04 21 and him saying nuh-uh.

04:04 22 MR. WALDROP: I understand, sir. I  
04:04 23 understand, Your Honor. I understand.

04:04 24 MR. ROSENTHAL: Thank you, Your Honor.

04:04 25 (Bench conference concludes.)

04:04 1 BY MR. WALDROP:

04:05 2 Q. We were talking, Dr. McClellan, before we  
04:05 3 discussed this, that we have DMPO.

04:05 4 And what is DMPO?

04:05 5 A. Yeah. We haven't really talked about DMPO  
04:05 6 yet. DMPO is the algorithm or the protocol that's  
04:05 7 implemented inside the VeloCloud devices that performs  
04:05 8 all of this network enhancement. It consists largely  
04:05 9 of software and data structures where it collects  
04:05 10 information and it uses that information to help make  
04:05 11 decisions about what -- what's going to happen.

04:05 12 Q. Now, let's turn to Slide 33.

04:05 13 What are the key features of DMPO? What makes  
04:05 14 it important in the VeloCloud product?

04:05 15 A. DMPO -- tunnels existed before DMPO. DMPO --  
04:05 16 the product that implements DMPO was actually pretty  
04:05 17 ingenious because it set a bunch of tunnels and then  
04:05 18 managed them in a certain way.

04:06 19 And setting up the tunnels between the little  
04:06 20 VeloCloud appliance devices is one thing. But managing  
04:06 21 those tunnels and orchestrating the traffic according  
04:06 22 to what the tunnel capabilities are is -- is -- is  
04:06 23 where we kind of ran into issues with this -- with the  
04:06 24 patent.

04:06 25 Q. And what are tunnels specifically, if you

04:06 1 could describe it again, Dr. McClellan?

04:06 2 A. Sure. A tunnel -- a tunnel in an IP network  
04:06 3 or in a packet-based network is -- you know, I talked  
04:06 4 before about how a packet is stuff in a box with a  
04:06 5 label. Well, a tunnel would be taking that box and  
04:06 6 putting it in another box and putting a different label  
04:06 7 on the other box.

04:06 8 So the first -- the outer box gets delivered  
04:06 9 where it needs to go. And then the inner box gets  
04:06 10 taken out and shipped on to your grandma.

04:06 11 Q. Now, Dr. McClellan, PTX-204 -- and I --

04:07 12 MR. ROSENTHAL: Objection, Your Honor.  
04:07 13 This demonstrative that's on the screen should be taken  
04:07 14 down. It is outside the scope of the report.

04:07 15 THE COURT: Can you tell us where in the  
04:07 16 report this is, Mr. Waldrop?

04:07 17 MR. WALDROP: Your Honor, this is  
04:07 18 Paragraph 106 of Dr. McClellan's report. Paragraph  
04:07 19 106.

04:07 20 MR. ROSENTHAL: It's not there, Your  
04:07 21 Honor.

04:07 22 THE COURT: Okay.

04:07 23 Mr. Waldrop and Mr. Rosenthal, if you  
04:07 24 would approach the bench.

04:07 25 MR. WALDROP: Thank you.

04:07 1 (Bench conference.)

04:08 2 MR. WALDROP: It's Paragraph 86. I'm  
04:08 3 sorry, Your Honor. Paragraph 86. I'm sorry.

04:08 4 MR. ROSENTHAL: Oh. 86.

04:08 5 MR. WALDROP: 86, Your Honor.

04:08 6 MR. ROSENTHAL: You can look at my copy.  
04:08 7 It's all marked up.

04:08 8 THE COURT: Mr. Rosenthal, if you'd put  
04:08 9 on the record what your concern is.

04:08 10 MR. ROSENTHAL: My concern is that the  
04:08 11 title of this slide and many others states an opinion  
04:08 12 that he never rendered, which is that the VeloCloud  
04:08 13 maintains information about the egress node. I mean,  
04:08 14 he testified the opposite. I'll get into that on  
04:08 15 cross. But there's nothing in his report that ever  
04:08 16 says that. It's a critical limitation of the claim.  
04:08 17 He never says it.

04:08 18 THE COURT: So if -- and, Mr. Waldrop,  
04:08 19 I'll give you a chance in just a second.

04:08 20 But it seems to me, looking at what I  
04:08 21 have in front of me on the slide, that the first  
04:08 22 sentence that's highlighted is just something I might  
04:08 23 find in any IEEE book that says how DMPO works.

04:09 24 MR. ROSENTHAL: Yes. That's not a  
04:09 25 problem.

04:09 1 THE COURT: That's not a problem.

04:09 2 MR. ROSENTHAL: My problem is the title  
04:09 3 of the slide.

04:09 4 THE COURT: Okay.

04:09 5 MR. ROSENTHAL: It's not the document.  
04:09 6 It's the title of the slide.

04:09 7 THE COURT: I got you.

04:09 8 MR. ROSENTHAL: What they've done is  
04:09 9 they've taken a lot of documents, and then they have  
04:09 10 these opinions on the top that aren't in his report.

04:09 11 THE COURT: Okay.

04:09 12 Where, Mr. Waldrop, do you have a  
04:09 13 statement in the report that says VeloCloud maintains  
04:09 14 information regarding congestion at an egress node?

04:09 15 MR. WALDROP: Well, we're mapping it to  
04:09 16 it. It doesn't use exactly that same language. It  
04:09 17 uses Edges and Gateways. It's mapping it to the  
04:09 18 language in the claim, Your Honor. He's explaining it  
04:09 19 for the jury.

04:09 20 THE COURT: Okay. But it can't be on --  
04:09 21 it can't be on -- unless it's in the report, it can't  
04:09 22 be on the demonstrative.

04:09 23 MR. WALDROP: So, Your Honor, if we take  
04:09 24 it off the slide -- if we take the title off the  
04:09 25 slide --

04:09 1 THE COURT: If you can take the title off  
04:09 2 the slide, I think Mr. Rosenthal will be happy. And I  
04:09 3 will miss getting to see you up here. But I will be  
04:09 4 happy.

04:09 5 MR. ROSENTHAL: As long as he doesn't  
04:09 6 just say the same thing.

04:09 7 THE COURT: Well, you can --

04:09 8 MR. ROSENTHAL: I'll make that objection  
04:10 9 when the time comes. Thank you, Your Honor.

04:10 10 (Bench conference concludes.)

04:10 11 BY MR. WALDROP:

04:10 12 Q. Okay. They can see it now. Can you see it  
04:11 13 now?

04:11 14 So as we were talking about before,  
04:11 15 Dr. McClellan, we were talking about the DMPO which is  
04:11 16 an accused functionality in the VeloCloud's product,  
04:11 17 Dr. McClellan?

04:11 18 A. Yes.

04:11 19 Q. Please describe what this Document PTX-204 is  
04:11 20 discussing regarding the DMPO.

04:11 21 A. Well, this document is a VMware document  
04:11 22 that's entitled "VeloCloud Dynamic Multipath  
04:11 23 Optimization." So it describes the technology in some  
04:11 24 detail.

04:11 25 And one of the characteristics of the

04:11 1 technology is called continuous path monitoring. And  
04:12 2 the highlighted portion you see here is that DMPO  
04:12 3 performs continuous measurements of performance metrics  
04:12 4 for every packet on every tunnel between any two of  
04:12 5 those little devices.

04:12 6 And the performance metrics that it measures  
04:12 7 are loss, latency and jitter.

04:12 8 Q. Please explain to the jury what is jitter  
04:12 9 packet loss and latency.

04:12 10 A. Packet loss is kind of obvious, right? The  
04:12 11 packets go into the network and then they get lost and  
04:12 12 they never show up at the other side. That's a problem  
04:12 13 because those packets have to be retransmitted. Or  
04:12 14 typically have to be retransmitted.

04:12 15 Latency is some sort of delay in how the  
04:12 16 packet is being sent from one end to the other. So  
04:12 17 latency is some measure of time difference or time  
04:12 18 error.

04:12 19 Jitter is a form -- is a calculation that's  
04:12 20 made using all of those time measurements that gives an  
04:12 21 idea of the variability of those time measurements. So  
04:13 22 if jitter is really high, that means that packets are  
04:13 23 getting delayed weird amounts. Sometimes they're slow,  
04:13 24 sometimes they're fast. That creates really high  
04:13 25 jitter.



04:13 1 Q. And why is VeloCloud measuring these metrics  
04:13 2 related to jitter latency and packet loss,  
04:13 3 Dr. McClellan?

04:13 4 A. Because these measurements give an indication  
04:13 5 of the health of the paths, right? Or the health of  
04:13 6 the tunnels. It's measuring those -- it's measuring  
04:13 7 those -- it's taking those -- that telemetry data from  
04:13 8 each direction in the path, right? Going to the left  
04:13 9 or going to the right. And it's -- and it's measuring  
04:13 10 it on every tunnel between every two endpoints.

04:13 11 And the reason for that is because it wants to  
04:13 12 find out what the health is of those different tunnels.

04:13 13 Q. Is it measuring congestion?

04:13 14 A. It makes a decision based on those loss,  
04:13 15 latency and jitter as to whether or not a congestion  
04:13 16 exists for various egress nodes.

04:14 17 MR. ROSENTHAL: Objection, Your Honor.  
04:14 18 That is not in his report.

04:14 19 THE COURT: Counsel, can you tell me --

04:14 20 MR. ROSENTHAL: That's just what we  
04:14 21 talked about.

04:14 22 MR. WALDROP: No, it's not, Your Honor.  
04:14 23 It is in his report, Your Honor. He has a whole  
04:14 24 section, Your Honor, regarding the egress node, Your  
04:14 25 Honor.

04:14 1 THE COURT: Okay. Well, if you can just  
04:14 2 cite the paragraph and the page, please.

04:14 3 MR. WALDROP: Paragraph 106, Your Honor.

04:14 4 MR. ROSENTHAL: Did you say 106?

04:14 5 MR. WALDROP: 140. I'm sorry. 140, Your  
04:14 6 Honor.

04:14 7 (Bench conference.)

04:14 8 MR. ROSENTHAL: Paragraph 140 just  
04:14 9 recites the claim language and says the claim --

04:15 10 MR. WALDROP: When he gets the evidence  
04:15 11 up here.

04:15 12 THE COURT: Well, this -- remind me  
04:15 13 exactly how you asked it.

04:15 14 MR. WALDROP: Your Honor?

04:15 15 THE COURT: How you asked the question.  
04:15 16 Remind me.

04:15 17 MR. WALDROP: I don't even remember, Your  
04:15 18 Honor. I don't think he -- I think he -- I don't think  
04:15 19 it was actually a response to the question. It's  
04:15 20 something he said, so I don't know.

04:15 21 MR. ROSENTHAL: I can clarify what the --  
04:15 22 what the specific testimony is that we have a problem  
04:15 23 with. Eliciting it or offering it. And that is there  
04:15 24 is nowhere in this report or in any of this evidence  
04:15 25 that's cited in which he says here's the thing where

04:15 1 the ingress node keeps track of information about  
04:15 2 what's happening at the egress node.

04:15 3 The only thing he ever talks about is  
04:15 4 paths. He never says anything that it represents  
04:15 5 what's happened at the egress node. And that's the  
04:15 6 problem.

04:15 7 THE COURT: So jumping ahead,  
04:16 8 Mr. Waldrop, where does he discuss how the ingress --

04:16 9 MR. WALDROP: I haven't gotten into the  
04:16 10 examination, Your Honor. But I can tell you later.  
04:16 11 We're just doing a background now, Your Honor. But I  
04:16 12 can -- this is the actual discussion of --

04:16 13 THE COURT: My sense is your problem is  
04:16 14 with his answer more than --

04:16 15 MR. ROSENTHAL: Yes. Yes.

16 MR. WALDROP: That's what I'm saying,  
17 Your Honor --

18 MR. ROSENTHAL: I think we should strike  
04:16 19 the answer --

04:16 20 (Simultaneous conversation.)

04:16 21 MR. WALDROP: And Your Honor, I have to  
04:16 22 be -- I have to just say, Your Honor, maybe we should  
04:16 23 stop, Your Honor. Because I felt like all of this  
04:16 24 was -- if it's going to be like this throughout the  
04:16 25 whole examination, Your Honor, we thought we gave them

04:16 1 these exhibits. We discussed it over time, Your Honor.

04:16 2 We could have dealt with these objections, Your Honor.

04:16 3 I feel like if he's going to interrupt the entire  
04:16 4 presentation, Your Honor, that's extremely prejudicial.

04:16 5 THE COURT: No, it's not. Here's the  
04:16 6 problem.

04:16 7 MR. WALDROP: Yeah.

04:16 8 THE COURT: Here's the problem.

04:16 9 MR. WALDROP: Yes, sir.

04:16 10 THE COURT: And this has never happened  
04:16 11 before -- is you should have a question -- I mean,  
04:16 12 let's face it, there's nothing you're asking that you  
04:16 13 haven't asked -- and he should have an answer.

14 MR. WALDROP: Yeah. Yeah.

04:17 15 THE COURT: Your question should elicit  
04:17 16 an answer that's somewhere in the report, as in you can  
04:17 17 say -- the question might be, is there any element --  
04:17 18 claim element not literally present?

04:17 19 And you go from there.

04:17 20 And the answer, you say, yes. It's 141.  
04:17 21 That's the way you do things.

04:17 22 MR. WALDROP: Yes, sir. Yes, sir.

04:17 23 THE COURT: And if -- and the problem  
04:17 24 is -- I don't know if it's a disconnect between the way  
04:17 25 he's answering on direct, which is usually more

04:17 1 trained, more -- I usually -- I always felt like I knew  
04:17 2 what my witness was going to say when I was on direct.  
04:17 3 And I don't necessarily get that sense here, but that's  
04:17 4 not my problem.

04:17 5 But if you elicit an answer, you should  
04:17 6 be able to come up and say, here is where it is in the  
04:18 7 report.

04:18 8 MR. WALDROP: Right, Your Honor. We  
04:18 9 haven't -- we had -- that's what I'm saying, Your  
04:18 10 Honor. We haven't even gotten to that part. We're  
04:18 11 just actually getting to the product now.

04:18 12 THE COURT: Everything you ask him,  
04:18 13 when -- if you had said, you know, where did you go to  
04:18 14 school? I mean, any opinion you ask -- either lawyer  
04:18 15 asks of any expert, you have to convince me that you  
04:18 16 disclosed it to opposing counsel before the jury hears  
04:18 17 it.

04:18 18 MR. WALDROP: Yes, sir.

04:18 19 MR. ROSENTHAL: And, Your Honor, I just  
04:18 20 wanted to say one thing, we raised every one of these  
04:18 21 objections last night. And for every slide --

22 (Simultaneous speakers.)

04:18 23 MR. ROSENTHAL: -- we asked them, where  
04:18 24 is it located in the report?

04:18 25 THE COURT: I'm saying it shouldn't be

04:18 1 this hard. Your direct should be robotic, ask him a  
04:18 2 question and he gives an answer that's found in here.

04:18 3 MR. WALDROP: I understand. Yes, sir. I  
04:18 4 understand. I understand.

04:18 5 MR. ROSENTHAL: Can we have the last  
04:18 6 answer stricken, please?

04:18 7 THE COURT: I will ask him to repeat --

04:18 8 MR. WALDROP: Repeat the question. I'll  
04:19 9 repeat the question.

04:19 10 THE COURT: (inaudible) -- or strike.  
04:19 11 And I have a feeling at this point no one will remember  
04:19 12 it. And I will instruct you not to --

04:19 13 MR. ROSENTHAL: I don't --

04:19 14 THE COURT: I'm not going to -- and you  
04:19 15 cannot -- do not raise what he said on that answer in  
04:19 16 closing argument.

04:19 17 MR. WALDROP: Okay. Yes, sir.

04:19 18 MR. ROSENTHAL: Or in any response to a  
04:19 19 motion.

04:19 20 (Bench conference concludes.)

04:19 21 MR. WALDROP: Does the jury still see the  
04:19 22 slides? Are you still able to see the slides?

04:19 23 Thank you. Thank you. Thank you very  
04:19 24 much.

04:19 25 So, Your Honor, I was going to move on,

04:19 1 Your Honor?

04:19 2 THE COURT: Okay.

04:19 3 MR. WALDROP: Thank you. And, Your

4 Honor...

5 BY MR. WALDROP:

04:19 6 Q. So, Dr. McClellan, we were talking about this

04:19 7 document that was measuring loss, latency and jitter.

04:19 8 I now want to turn to the next slide, which talks about

04:19 9 the VeloCloud document.

04:20 10 Could we move there?

04:20 11 Please describe to the jury what we're seeing

04:20 12 on Slide 35.

04:20 13 A. So on the left hand of this slide at the top

04:20 14 is the VeloCloud appliance device, Edge device or

04:20 15 Gateway device.

04:20 16 In the middle -- and the bottom of the

04:20 17 left-hand side kind of shows an example of how it

04:20 18 manages traffic on the network.

04:20 19 And on the right-hand side, these are all

04:20 20 things from the same document. And I can't see the

04:20 21 document number because there's a menu that's laid over

04:20 22 it. So if I don't call out --

23 Q. It's PTX-126.

04:20 24 A. -- the number, that's why.

04:20 25 On the right-hand side is -- it is a flowchart

04:20 1 of how packets get dealt with in the side the software  
04:20 2 of the device.

04:20 3 Packets enter at the top and then kind of get  
04:20 4 analyzed, and they get put in different types of  
04:20 5 buckets and then based on what the traffic requirements  
04:20 6 are of the packet.

04:20 7 And they get -- the packets get put in  
04:21 8 different types of buckets, and then things kind of  
04:21 9 percolate down.

04:21 10 And then the sort of blue and the green stuff  
04:21 11 in the middle shows that it says path selection. And  
04:21 12 then it goes past the path selection into -- so the top  
04:21 13 part is the network scheduler and the bottom part is  
04:21 14 the link scheduler.

04:21 15 It passes through the path selection into the  
04:21 16 bottom part called the link scheduler. And then at  
04:21 17 that point, the packet exits from the VeloCloud device  
04:21 18 into the load-balancing network.

04:21 19 Q. Now, Dr. McClellan, I want to make sure that I  
04:21 20 understand here.

04:21 21 Are we seeing in the document on the left, do  
04:21 22 we see the VeloCloud product that's accused in this  
04:21 23 case, right?

04:21 24 A. Yes.

04:21 25 Q. Yes or no?



04:21 1 A. Yes.

04:21 2 Q. And then on the right, we see the flowchart  
04:21 3 for the VeloCloud product?

04:21 4 A. Yes.

04:21 5 Q. And this is a process showing how process --  
04:21 6 how packets are processed by the VeloCloud product?

04:21 7 A. Yeah. It shows how the VeloCloud product  
04:21 8 thinks about the packets that come into it.

04:21 9 Q. And so what is the high-level takeaway that  
04:22 10 the jury should take from PTX-126 about how packets are  
04:22 11 routed?

04:22 12 A. One of the things -- I think one of the  
04:22 13 high-level takeaways is on the Figure 2 on the  
04:22 14 left-hand side at the bottom. It shows the two  
04:22 15 VeloCloud devices communicating with each other, and it  
04:22 16 shows different types of traffic that's color-coded.

04:22 17 You got red traffic, yellow traffic and, looks  
04:22 18 like, blue traffic. And different packets of different  
04:22 19 types are being sent on different links, different  
04:22 20 paths from one device to the other.

04:22 21 Q. Now, Dr. McClellan, I'm going to move to Slide  
04:22 22 36.

04:22 23 MR. WALDROP: And I want to move Exhibit  
04:22 24 126 into evidence as well Exhibit 204.

04:22 25 MR. ROSENTHAL: No objection, Your Honor.

04:22 1 THE COURT: Be admitted.

04:22 2 MR. WALDROP: As well as Exhibit 125 and  
04:22 3 Exhibit 211. PTX-211, Slide 110.

04:22 4 BY MR. WALDROP:

04:23 5 Q. Now, turning back to this flow chart --

04:23 6 MR. ROSENTHAL: No objection, Your Honor.

04:23 7 THE COURT: They'll be admitted.

04:23 8 BY MR. WALDROP:

04:23 9 Q. On Slide 36, Dr. McClellan, I want to go a  
04:23 10 little further.

04:23 11 At Level 1, do we see that packets are  
04:23 12 entering the system? Is that right?

04:23 13 A. Yes. Packets enter from the top of the  
04:23 14 diagram, and then they kind of percolate downwards.

04:23 15 Q. Please walk the jury through this flowchart so  
04:23 16 that they understand how VeloCloud processes packets.

04:23 17 A. All right. So the packets enter up here --  
04:23 18 oh, I thought I could -- let me touch that.

04:23 19 The packets enter up here and they go in that  
04:23 20 direction. And they first go through the network  
04:23 21 scheduler, which is at the top, and then they go  
04:23 22 through the link scheduler, which is at the bottom.

04:23 23 And you see here this kind of zoom-in of the  
04:23 24 red box on the left-hand side on the -- that's shown on  
04:23 25 the right-hand side over here shows that the traffic --

04:24 1 that multiple packets are being separated into  
04:24 2 different buckets and those different buckets are how  
04:24 3 to treat -- how to deal with that traffic.

04:24 4 What kind of traffic is it? How do I need to  
04:24 5 deal with it in the future? Does it need certain types  
04:24 6 of guarantees? Is it just generic traffic that I can  
04:24 7 just kind of throw away if I need to?

04:24 8 And then the bottom box down here shows the  
04:24 9 path selection. So after the -- after the link network  
04:24 10 scheduler processes the packets and organizes them in  
04:24 11 some respect, then it uses information that's been  
04:24 12 gathered over time to make a selection of the path to  
04:24 13 put the packets in.

04:24 14 Q. Now, Dr. McClellan, how specifically are  
04:24 15 packets prioritized by DMPO or Dynamic Multi-Path  
04:24 16 Optimization?

04:24 17 A. Well, the prioritization of packets is kind of  
04:24 18 a -- is kind of an application-specific problem. And  
04:24 19 so what DMPO has is kind of a nicely generic way of  
04:25 20 doing this.

04:25 21 You can see on the bottom right over here,  
04:25 22 there's a matrix. And on the top of the matrix, you  
04:25 23 see there's high, normal and low. Those are  
04:25 24 priorities. And on the side of the matrix, you see how  
04:25 25 the traffic needs to be treated: Realtime,

04:25 1 transactional and bulk.

04:25 2           So if you were, for example, sending -- if  
04:25 3 there were two video streams on the network and one of  
04:25 4 them was -- if you were at your house and one video  
04:25 5 stream was you talking to grandma and another video  
04:25 6 stream was your kid talking to another kid, you know,  
04:25 7 you talking to grandma might have a higher priority  
04:25 8 than the kid talking to their buddy.

04:25 9           And so both of those pieces of traffic might  
04:25 10 be realtime traffic because they're video, but one of  
04:25 11 them might have a higher priority than the other one.

04:25 12           And so that's what happens in the traffic  
04:25 13 classification part of the network scheduler.

04:26 14           Q.     Now, Dr. McClellan, we see here on PTX-125, it  
04:26 15 shows that the packets are prioritized high, normal and  
04:26 16 low.

04:26 17           Do you see that?

04:26 18           A.     Right.

04:26 19           Q.     Please explain to the jury what's going on  
04:26 20 with that.

04:26 21           A.     Well, the high, normal and low is different  
04:26 22 types of traffic and how they need to be treated. And  
04:26 23 those are priority levels.

04:26 24           And the realtime, transactional and bulk is  
04:26 25 kind of classifications of traffic that fit into those

04:26 1 different buckets. And you can see examples in the  
04:26 2 blue, green and red squares of different types of  
04:26 3 traffic that fit into those different buckets.

04:26 4 Q. What does PTX-125 say when there's no  
04:26 5 congestion? What does it say about that?

04:26 6 A. You can see above -- above the matrix, you can  
04:26 7 see the two underlined areas that talks about during  
04:26 8 congestion and when there is no congestion.

04:26 9 So during congestion over here and when  
04:26 10 there's no congestion.

04:26 11 So the device at the ingress side is aware of  
04:27 12 congestion on the network and it's making decisions  
04:27 13 that are different based on the determination of  
04:27 14 congestion. And those decisions are how to handle the  
04:27 15 traffic.

04:27 16 Q. What happens when congestion is detected?

04:27 17 A. Well, it says, during periods of congestion,  
04:27 18 it makes decisions based on scheduler weight or it will  
04:27 19 have a minimum guaranteed aggregate bandwidth based on  
04:27 20 scheduler weight.

04:27 21 And then during periods -- --

04:27 22 MR. ROSENTHAL: Objection, Your Honor.

23 A. -- of no congestion --

04:27 24 MR. ROSENTHAL: Objection.

04:27 25 A. -- the decisions are different.

04:27 1 THE COURT: Doctor.

04:27 2 MR. ROSENTHAL: I'm so sorry. The slide  
04:27 3 that is currently on the screen has the same problem as  
04:27 4 the ones that we talked about.

04:27 5 MR. WALDROP: This is a different slide.  
04:27 6 We should have moved off this slide.

04:27 7 We should move off this slide. Stay on  
04:27 8 the slide here. We'll stay here.

04:27 9 Thank you.

04:27 10 MR. ROSENTHAL: I'm sorry -- so sorry to  
04:27 11 interrupt.

04:27 12 MR. WALDROP: Okay.

04:27 13 BY MR. WALDROP:

04:27 14 Q. So staying on Slide 37.

04:27 15 A. Okay. So it says, during periods of  
04:27 16 congestion, it will treat the packets according to the  
04:27 17 scheduler weight. And during periods of no congestion,  
04:27 18 the applications will be allowed to burst up to their  
04:27 19 maximum aggregate bandwidth. So it's a different way  
04:27 20 of treating the traffic whether congestion is detected  
04:28 21 or not.

04:28 22 Q. Now, I want to direct you to slide -- this  
04:28 23 understanding as to how the packets and the paths are  
04:28 24 selected, did you review deposition testimony,  
04:28 25 Dr. McClellan, to confirm your understanding?

04:28 1 A. Yes.

04:28 2 Q. And I would like to turn to Slide 39.

04:28 3 Please explain to the jury how this deposition  
04:28 4 testimony from Mr. Connors, who's a VP at VMware,  
04:28 5 confirmed your understanding of how VeloCloud works  
04:28 6 with respect to selecting the path.

04:28 7 A. You can see the highlighted places from the  
04:28 8 deposition testimony. It says: When a packet comes  
04:28 9 in -- so at ingress -- the device thinks about the  
04:28 10 packet.

04:28 11 And this part over here is the part of the  
04:28 12 device that thinks about the packet. And --

04:28 13 Q. So if you could read the actual language to --

04:28 14 A. So the highlighted topic, the part at the top,  
04:28 15 says when a packet comes in, link select load balance  
04:28 16 chooses.

04:29 17 A link select load balance is part of the  
04:29 18 software. And the choice it makes is to choose  
04:29 19 potentially the lowest latency path that meets  
04:29 20 acceptable quality for the application.

04:29 21 And so the -- there's a context-sensitive  
04:29 22 decision being made by the device as to what to do with  
04:29 23 the traffic.

04:29 24 Q. Now, I'd like to direct you to Slide 40,  
04:29 25 Dr. McClellan. After the path is selected, which we

04:29 1 saw here in PTX-126, what does it show about what DMPO  
04:29 2 looks again at congestion?

04:29 3 A. So after a path selection it falls into the  
04:29 4 link scheduler part of the diagram which is at the  
04:29 5 bottom. And these are blown-up parts of the link  
04:29 6 scheduler.

04:29 7 You can see in the blue on the left it talks  
04:29 8 about two different types of links that get to the  
04:29 9 Internet. And the blue on the right corresponds with  
04:29 10 the blue on the left, right? And these are local  
04:29 11 links.

04:29 12 Q. And what does VeloCloud do with this  
04:29 13 information, Dr. McClellan?

04:29 14 A. It uses that information to try to -- to try  
04:30 15 to define where, when the traffic comes in this  
04:30 16 direction from the left to the right, which in the  
04:30 17 other picture is from the top to the bottom, where it's  
04:30 18 going to go and how it's going to get there.

04:30 19 You can see in the -- in the green box on the  
04:30 20 right-hand side over here, you can see where it talks  
04:30 21 about remote site WAN links, and those two WAN links  
04:30 22 there at the top are both kind of pink. So that's the  
04:30 23 end of a path. And there's a bunch of different ways  
04:30 24 to get to that end of the path.

04:30 25 MR. ROSENTHAL: I'm sorry. Objection.



04:30 1 That opinion is not in his report.

04:30 2 MR. WALDROP: He's referring to the  
04:30 3 document, Your Honor. And he's discussing -- on Slide  
04:30 4 40, Your Honor, he's discussing here on Paragraph 100  
04:31 5 and 101, Your Honor, and 102, Your Honor.

04:31 6 If we may approach, Your Honor.

04:31 7 THE COURT: Sure.

04:31 8 (Bench conference.)

04:31 9 MR. ROSENTHAL: Your Honor, my objection  
04:31 10 specifically -- I don't have any problem with his  
04:31 11 discussing this picture. The problem is he never  
04:31 12 connects this picture to the end of the path, the  
04:31 13 egress node anywhere in his report.

04:31 14 MR. WALDROP: He never said egress node.

04:31 15 THE COURT: I'll wait until I hear  
04:31 16 Mr. Waldrop ask him for that opinion.

04:31 17 MR. ROSENTHAL: Okay.

04:31 18 THE COURT: If he has that opinion, I'm  
04:31 19 ready for it.

04:31 20 MR. ROSENTHAL: Okay. I heard him say  
04:31 21 it, but that's my problem.

04:31 22 THE COURT: Okay. That's not what I  
04:31 23 heard him say. I mean, that's not the way I took it.  
04:31 24 But maybe I wasn't listening carefully enough.

04:32 25 MR. WALDROP: Your Honor, Your Honor, I

04:32 1 appreciate you, Your Honor. Thank you for the -- Your  
04:32 2 Honor, this is -- we're talking about one of their  
04:32 3 documents. He's describing the flow of their  
04:32 4 documents. He is not mentioning --

04:32 5 THE COURT: I think -- and he can speak  
04:32 6 for himself. But, again, I'm just a gatekeeper.

7 MR. WALDROP: Yes, sir. I understand.

04:32 8 THE COURT: If you have somewhere in his  
04:32 9 report he makes the statement that you want him to  
04:32 10 say -- what statement -- okay. Let's try it backwards.

04:32 11 MR. ROSENTHAL: What do I have a problem  
04:32 12 with? Yeah. What I have a problem with, so he cites  
04:32 13 this document, of course. But what I have problem  
04:32 14 is --

04:32 15 MR. WALDROP: It's not this document.  
04:32 16 It's this document. This is the document --

04:32 17 MR. ROSENTHAL: This is the one that I'm  
04:32 18 actually talking about.

04:32 19 MR. WALDROP: See, that's what I'm  
04:32 20 saying, Your Honor --

21 MR. ROSENTHAL: That's what's on the  
04:32 22 slide, right there.

04:32 23 MR. WALDROP: No.

04:32 24 MR. ROSENTHAL: He's talking about these  
25 two.

1 MR. WALDROP: No. No.

04:32 2 MR. ROSENTHAL: Maybe I can just finish  
04:32 3 describing it.

04:32 4 THE COURT: Let me just stop you. Tell  
04:32 5 me what --

04:32 6 MR. ROSENTHAL: So this is Paragraph 100,  
04:32 7 Page 52 of his report.

04:32 8 THE COURT: And you're saying that the  
04:32 9 slide we're looking at, Slide 40, that's where the  
04:32 10 figure on the slide that the jury is --

04:32 11 MR. ROSENTHAL: That is correct.

12 MR. WALDROP: That is --

04:33 13 MR. ROSENTHAL: On the right side of the  
04:33 14 screen you can see it's on the screen right now he's  
04:33 15 talking about these links right here, okay? And he's  
04:33 16 saying these pink ones -- he just said it. I think  
04:33 17 it's in the transcript. He said this corresponds to --

04:33 18 THE COURT: I heard him say it. Are  
04:33 19 those the --

04:33 20 MR. ROSENTHAL: That's what he just said.  
04:33 21 He doesn't say that in his report. He says that's the  
04:33 22 end of the path.

04:33 23 THE COURT: Okay.

04:33 24 So yes, sir, Mr. Waldrop.

04:33 25 MR. WALDROP: I was not talking about

04:33 1 that, Your Honor. And I don't think that's what he  
04:33 2 said, Your Honor. Your Honor, we had not even -- this  
04:33 3 is not even -- what he's showing you described is not  
04:33 4 what the jury's actually even seeing, Your Honor.

04:33 5 THE COURT: Well, it is what the jury is  
04:33 6 seeing. I'm looking at it.

04:33 7 MR. ROSENTHAL: That's what I thought.

04:33 8 THE COURT: That is what he's seeing.

04:33 9 MR. WALDROP: This is not the full  
04:33 10 document. But I'm saying it's not the full document.  
04:33 11 They're seeing him writing through the flow through the  
04:33 12 whole thing there.

04:33 13 THE COURT: But what they're seeing  
04:33 14 is what Mr. Rosenthal just circled and that he's  
04:33 15 concerned about.

04:33 16 MR. WALDROP: Yes, sir. Yes, sir.

04:33 17 THE COURT: So I'm not following what  
04:33 18 you're saying.

04:33 19 MR. WALDROP: We haven't even got there.  
04:33 20 We're talking about something that's about to happen.

04:34 21 THE COURT: But he just talked about it.

04:34 22 MR. WALDROP: I don't think he did, Your  
04:34 23 Honor.

04:34 24 MR. ROSENTHAL: Well, the transcript will  
04:34 25 say what he said. What he said was -- and I'm

04:34 1 listening very carefully because I know for a fact that  
04:34 2 there's no opinion in here about the egress node having  
04:34 3 any information stored in the ingress node. So  
04:34 4 whenever he says --

04:34 5 MR. WALDROP: That's not true, Your  
04:34 6 Honor.

04:34 7 MR. ROSENTHAL: So whenever he says --

04:34 8 THE COURT: Let's try this. I'm going  
04:34 9 to --

04:34 10 MR. WALDROP: You see the problem, Your  
04:34 11 Honor, is that we're having an argument about the  
04:34 12 sufficiency of his opinion, Your Honor, at trial.

04:34 13 THE COURT: It's not sufficiency, it's  
04:34 14 whether or not they're in the report.

04:34 15 MR. WALDROP: But we had -- Your Honor,  
04:34 16 but we had this argument at --

04:34 17 THE COURT: I'm going to --

04:34 18 MR. WALDROP: -- at the pretrial  
04:34 19 conference, Your Honor.

04:34 20 THE COURT: I'm going to ask y'all to  
04:34 21 step back.

22 MR. WALDROP: Okay.

04:34 23 THE COURT: I'm going to strike the  
04:34 24 answer. You can ask a new question.

04:34 25 Do you have an extra copy of his report?

04:34 1 MR. WALDROP: Oh, yes, sir.

04:34 2 THE COURT: If you would -- next time you  
04:34 3 come up, bring me an extra copy --

4 MR. WALDROP: Okay. I'm sure we'll do  
5 that.

04:34 6 THE COURT: -- and just leave it up here.

04:34 7 MR. WALDROP: I'm sure we will, Your  
04:34 8 Honor.

04:34 9 (Bench conference concludes.)

04:35 10 THE COURT: Ladies and gentlemen, I  
04:35 11 wasn't sure I exactly heard the last answer this  
04:35 12 gentleman gave correctly. So I'm going to strike it  
04:35 13 and ask Mr. Waldrop to ask the question again so I can  
04:35 14 make sure that I'm following what he's saying.

04:35 15 BY MR. WALDROP:

04:35 16 Q. Now, we were talking about this. And when I  
04:35 17 talk to you about this figure, Dr. McClellan, I want to  
04:35 18 make sure that we're using just only the language that  
04:35 19 is found in the VMware document.

04:35 20 A. Okay.

04:35 21 Q. So no language regarding the patent or  
04:35 22 anything like that.

04:35 23 A. Okay.

04:35 24 Q. Please describe to them the flow using only  
04:36 25 the language that is --

04:36 1 A. In the figure.

04:36 2 Q. -- in the figure that VMware uses to describe  
04:36 3 the product. We'll talk about the links later.

04:36 4 A. Okay. I'm going to focus on the right-hand  
04:36 5 side. Is that right?

04:36 6 Q. Yes.

04:36 7 A. Is that okay?

04:36 8 This side says local links. This side says  
04:36 9 remote links. This part says remote site X. This one  
04:36 10 says remote site Y.

04:36 11 Obviously the pink ones and the yellow ones  
04:36 12 are at two different locations. So when packets come  
04:36 13 in, the device on the local side has to make a decision  
04:36 14 about how it's going to get to the remote side.

04:36 15 And as we discussed previously, the local side  
04:36 16 and the remote side are connected by tunnels. And the  
04:37 17 tunnels are called paths.

04:37 18 Q. Now, moving on to Slide 41, Dr. McClellan,  
04:37 19 what else does PTX-126 say about this congestion?  
04:37 20 Using the language that VMware uses regarding how it  
04:37 21 deals with processing packets to alleviate congestion.

04:37 22 A. Yeah. This is the -- this is the VMware  
04:37 23 document that talks about handling packets inside that  
04:37 24 last part of the -- of the device. And it talks about  
04:37 25 it doesn't want to do things that cause congestion.

04:37 1 And with this improvement -- with this feature  
04:37 2 improvement which it's talking about some aspect of the  
04:37 3 product, the link scheduler will prioritize higher  
04:37 4 priority traffic differently, or will handle higher  
04:37 5 priority traffic differently in the presence of issues  
04:37 6 on the network.

04:37 7 Q. Now, looking at Slide -- at PTX-126,  
04:38 8 Dr. McClellan, what does it say about the link  
04:38 9 scheduler in terms of what it does?

04:38 10 A. Well, the link scheduler is the thing that we  
04:38 11 saw previously, which is the last stage in the  
04:38 12 processing of the packets.

04:38 13 And so it makes sort of the final decision as  
04:38 14 to how that packet is going to get to the other side.  
04:38 15 And it may have a couple of different options to  
04:38 16 make -- to find a way for that packet to get to the  
04:38 17 other side.

04:38 18 And so it's choosing links that are inside of  
04:38 19 a path and the links may have slightly different  
04:38 20 characteristics.

04:38 21 And so the link scheduler is sensitive to the  
04:38 22 priority of the packets. And under issues of -- when  
04:38 23 there's network issues, the link scheduler handles  
04:38 24 those different priority packets in a different way.

04:38 25 Q. Did you review any deposition testimony or



04:39 1 statements from VMware regarding what the link  
04:39 2 scheduler does to confirm your understanding of what  
04:39 3 the link scheduler does?

04:39 4 A. Yes. This is the deposition again from  
04:39 5 Mr. Connors that talks about the link controller  
04:39 6 that's -- you can see where he talks about high  
04:39 7 priority and low priority, differentiating --  
04:39 8 differentiated service between different flows of  
04:39 9 traffic.

04:39 10 Q. Now, was there other statements that further  
04:39 11 confirmed your understanding about how the link  
04:39 12 scheduler looks at priority, Dr. McClellan?

04:39 13 A. This is further in Mr. Connors' deposition.  
04:39 14 And you can see the highlighted part here that says:  
04:39 15 When packets are in queue to the link scheduler, they  
04:39 16 have a priority associated with them from the flow.

04:39 17 This is Mr. Connors saying this. And he's  
04:39 18 pointing to this particular part of the code called the  
04:39 19 link scheduler. And the link scheduler's sensitive to  
04:39 20 the priorities of the packets that are in its queue.

04:39 21 Q. Now, when it says "code" on the -- when it  
04:39 22 says "code" there, what does that mean in that  
04:40 23 statement there?

04:40 24 A. It's talking about the software that runs on  
04:40 25 the little appliance device.

04:40 1 Q. Now, did you review this code in connection  
04:40 2 with how to understand how the accused products work,  
04:40 3 Dr. McClellan?

04:40 4 A. Yes.

04:40 5 Q. And we'll get into a little bit later.

04:40 6 What is your understanding of VMware DMPO or  
04:40 7 Dynamic Multi-Path Optimization?

04:40 8 A. Well, my understanding is that it functions as  
04:40 9 we've described, and some of those functions are pretty  
04:40 10 important.

04:40 11 This is a qualitative slide from some VMware  
04:40 12 documents. And, again, I can't tell what document it  
04:40 13 is, because on this screen there's an annotation menu.

04:40 14 Q. It's PTX-114.

04:40 15 A. Okay. On the left-hand side, you see from  
04:40 16 their marketing document, it talks about the  
04:40 17 performance of a video -- whoa. It went away.

04:40 18 Did I do that?

04:41 19 Q. Okay. We're back now. Thank you so much.

04:41 20 MR. WALDROP: Thank you so much.

04:41 21 Can you see -- y'all see now? I just  
04:41 22 need to --

04:41 23 DEPUTY CLERK: It's not admitted.

04:41 24 MR. WALDROP: Oh, it's not admitted.

04:41 25 Well, let me go ahead and try to move it in now.

1 BY MR. WALDROP:

04:41 2 Q. Dr. McClellan, are you familiar with the  
04:41 3 benefits of VeloCloud, 114 -- the benefits of  
04:41 4 VeloCloud?

04:41 5 A. Yes.

04:41 6 Q. And I'm going to show you now what's been  
04:41 7 previously marked as PTX-114.

04:41 8 Is it showing now?

04:41 9 A. I can see it, but they can't.

10 MR. WALDROP: Should I go ahead and press  
04:41 11 the button? I can press the button?

04:41 12 DEPUTY CLERK: It's not admitted, so only  
04:41 13 he can see it.

04:41 14 MR. WALDROP: Okay. Then we'll just show  
04:41 15 the Slide 44 then. Thank you.

04:41 16 If you can put Slide 44 back onto the  
04:41 17 slide.

04:41 18 Is it published to the jury?

04:41 19 I can't even show the slide deck?

04:41 20 DEPUTY CLERK: If it's not admitted, it  
04:41 21 can't be viewed.

22 BY MR. WALDROP:

04:42 23 Q. Now, Dr. McClellan, did you rely on VeloCloud  
04:42 24 documents PTX-114 to describe the benefits of  
04:42 25 VeloCloud?

04:42 1 A. Yes.

04:42 2 Q. And you've reviewed this document in  
04:42 3 formulating your opinions?

04:42 4 A. Yes.

04:42 5 MR. WALDROP: I move this document into  
04:42 6 evidence.

04:42 7 MR. ROSENTHAL: No objection, Your Honor.

04:42 8 THE COURT: It'll be admitted.

04:42 9 MR. WALDROP: Can the jury see it now?

10 BY MR. WALDROP:

04:42 11 Q. Please describe the significance of this  
04:42 12 document, Dr. McClellan.

04:42 13 A. So this is a document from one of the VMware  
04:42 14 marketing presentations that shows on the left-hand  
04:42 15 side -- it shows a video conference, and it's the same  
04:42 16 video conference under two different network  
04:42 17 conditions.

04:42 18 On the left-hand side with the red stripe  
04:42 19 underneath it, it says "without VMware SD-WAN" or  
04:42 20 "without VeloCloud."

04:42 21 And on the right-hand side with the green  
04:42 22 stripe underneath it, it says "with VMware SD-WAN" or  
04:43 23 "with VeloCloud."

04:43 24 Obviously -- and you see the green up at the  
04:43 25 top where it talks about a link with 2 percent packet

04:43 1 loss. So that's some degradation in a network, there's  
04:43 2 a problem in the network.

04:43 3 Obviously, the picture on the right is useful.  
04:43 4 You can tell that the guy is there. He's got a picture  
04:43 5 of something and he's pointing to it.

04:43 6 And on the left, it looks like something out  
04:43 7 of a horror movie or something. It looks like a  
04:43 8 monster. You can't tell anything. You can't tell that  
04:43 9 it's a guy with a picture or anything.

04:43 10 So the benefits of the technology are very  
04:43 11 clear from this particular slide.

04:43 12 Q. Now, comparing the figure on the left or the  
04:43 13 picture on the left with the picture on the right, is  
04:43 14 this a significant improvement, Dr. McClellan?

04:43 15 A. I think we leave that to the jury's eyeballs  
04:43 16 to see that. I mean, it's pretty obvious to me that  
04:43 17 it's a significant improvement.

04:43 18 Q. Are you aware of any statistics that show that  
04:43 19 VeloCloud or VeloCloud SD-WAN DMPO actually reduces  
04:44 20 congestion, Dr. McClellan?

04:44 21 A. Yes.

04:44 22 Q. And what is that next slide?

04:44 23 A. So this is another slide from a marketing  
04:44 24 document that talks about a period of traffic  
04:44 25 between -- during the month of November of 2020 where

04:44 1 they apparently were doing some side-by-side testing of  
04:44 2 the -- of the network with and without, again, the  
04:44 3 VeloCloud technology.

04:44 4 The light blue stripes are without the  
04:44 5 VeloCloud technology, and the dark blue stripes that  
04:44 6 are very small are with the VeloCloud technology.

04:44 7 And you can see from the title at the top that  
04:44 8 it says "VMware WAN mitigated 86 percent of total  
04:44 9 brownout duration."

04:44 10 So what this slide is talking about is that  
04:44 11 the blue stripes are without the VeloCloud, and it's  
04:44 12 showing the duration of network problems that occurred  
04:44 13 and how VeloCloud mitigates them with the dark blue  
04:45 14 stripes down at the bottom.

04:45 15 And the brownout -- amount of time for the  
04:45 16 brownout was just, you know, brownout is the network  
04:45 17 doesn't perform as it's supposed to, which can include  
04:45 18 a lot of different factors such as congestion.

04:45 19 And so the mitigation of those brownouts  
04:45 20 really adds to a lot of efficiency in the people that  
04:45 21 are using the network.

04:45 22 Q. Now, Dr. McClellan, 86 percent is significant?

04:45 23 A. 86 percent is significant, but the percentage,  
04:45 24 I think, is not as important as this hour figure down  
04:45 25 here. That's eight hours of brownout time per month.

04:45 1 That's eight hours of efficient network use that your  
04:45 2 business just got back. That's real money.

04:45 3 Q. Now, Dr. McClellan, I want to now direct you  
04:45 4 to the '133 patent in this case.

04:45 5 Dr. McClellan, we talked about before, do you  
04:46 6 have --

04:46 7 MR. ROSENTHAL: Your Honor, I'm sorry.  
04:46 8 You've ruled on this already. I object to this  
04:46 9 comparison.

04:46 10 Can we take it down, please?

04:46 11 MR. WALDROP: It's the patent, Your  
04:46 12 Honor.

04:46 13 THE COURT: Well, it's not just the  
04:46 14 patent. So you can show the patent.

04:46 15 MR. WALDROP: Okay. Yes, Your Honor.

04:46 16 You can take the slide down.

04:46 17 If we go to Slide 47.

18 BY MR. WALDROP:

04:46 19 Q. We're at a summary of your opinions,  
04:46 20 Dr. McClellan.

04:46 21 Do you believe that VMware Edge/Gateway  
04:46 22 devices, what we call VeloCloud with DMPO, infringe  
04:46 23 Claim 13 of the '133 patent?

04:46 24 A. Yes.

04:46 25 Q. Now, Dr. McClellan, I also want to ask you

04:46 1 regarding -- what is your technical apportionment value  
04:46 2 of what the value of the VMware Edge/Gateway products  
04:46 3 with SD-WAN contribute to the accused functionality in  
04:46 4 the product?

04:47 5 A. In my assessment, the '133 patent accounts for  
04:47 6 some 72 percent of the value of the VeloCloud products.

04:47 7 Q. Can you further explain what you mean by that,  
04:47 8 Dr. McClellan, to the jury?

04:47 9 A. Well, the -- to come up with this number what  
04:47 10 we did was analyze the product, analyze the  
04:47 11 characteristics of the product, group the  
04:47 12 characteristics of the product in groupings that made  
04:47 13 sense to each other and then evaluated how much those  
04:47 14 groupings contributed to the function of the product.

04:47 15 And then in addition to that, we compared that  
04:47 16 function of the -- those different functions of the  
04:47 17 product to the functionality that's described by the  
04:47 18 patent.

04:47 19 And so that -- at the end of that process, you  
04:47 20 know, you end up with 72 percent.

04:47 21 MR. WALDROP: Now, I would like to show  
04:47 22 the witness PTX-211, Your Honor. And may I approach so  
04:48 23 I can just make sure, Your Honor, that he's able to at  
04:48 24 least see this picture, Your Honor?

04:48 25 THE COURT: Sure.



04:48 1 (Bench conference.)

04:48 2 MR. WALDROP: I'm going to put that on  
04:48 3 the ELMO, Your Honor.

04:48 4 THE COURT: Is this what was in the page  
04:48 5 that --

04:48 6 MR. ROSENTHAL: It is. I have no problem  
04:48 7 with him asking him what it says.

04:48 8 MR. WALDROP: And I'll be very clear,  
04:48 9 Your Honor, about my questions, Your Honor.

04:48 10 THE COURT: Do whatever you need to do.

04:48 11 MR. WALDROP: I appreciate you, sir.  
04:48 12 Thank you.

04:48 13 (Bench conference concludes.)

04:48 14 BY MR. WALDROP:

04:49 15 Q. Now, I'm going to ask you some very specific  
04:49 16 questions, Dr. McClellan, which are important.

04:49 17 Dr. McClellan, you see this figure here. And  
04:49 18 I'll be very specific. You see the figure provided  
04:49 19 here, Dr. McClellan?

04:49 20 MR. WALDROP: Can the jury see it yet?  
04:49 21 I'm showing them what is PTX-211.

04:49 22 (Off-the-record discussion.)

04:50 23 MR. WALDROP: Can they see it now?

04:50 24 (Off-the-record discussion.)

04:50 25 MR. WALDROP: So 211 has been admitted.

04:50 1 So can we put 211 up there on the screen?

04:50 2 You can see it now?

04:50 3 Okay. Thank you very much.

4 BY MR. WALDROP:

04:50 5 Q. So I'm going to ask you some specific  
04:50 6 questions, Dr. McClellan.

04:50 7 This figure here with the colors, is this an  
04:50 8 example of VeloCloud with DMPO?

04:50 9 A. Yes.

04:50 10 Q. And is this one of the accused products in  
04:50 11 this case?

04:50 12 A. Yes.

04:50 13 Q. And does this figure show that -- and for the  
04:50 14 purposes of the jury, I would like for you to discuss  
04:51 15 what's on the right using only the language that you  
04:51 16 see that VMware uses. And we'll talk about the patent  
04:51 17 language later, but now use only the language that the  
04:51 18 document used and explain to the jury what is happening  
04:51 19 here respect to VeloCloud DMPO.

04:51 20 A. Okay. So these green things here are those  
04:51 21 little devices that we saw before. And they're placed  
04:51 22 at each one of the corners. And they're called -- the  
04:51 23 hubs are configured in the orchestrator, and the hubs  
04:51 24 are these devices up here. And all of the devices  
04:51 25 communicate with each other.

04:51 1 You can see here in the middle that it says:  
04:51 2 VMware SD-WAN Edges build static multipath tunnels to  
04:51 3 the hub.

04:51 4 These are the multipath tunnels. And you can  
04:51 5 see that the multipath tunnels exist between all pairs  
04:52 6 of the little devices.

04:52 7 And so the Edges -- the third thing doesn't  
04:52 8 really matter that much. They use VMware SD-WAN  
04:52 9 Gateway to distribute routes. End-to-end traffic gets  
04:52 10 sent to the hub and all that stuff.

04:52 11 But the whole purpose here of this figure is  
04:52 12 to show that there are tunnels built between each pairs  
04:52 13 of the little devices.

04:52 14 Q. Now, I also want to talk to you a little bit  
04:52 15 about some of the detail about what you've talked about  
04:52 16 before. Do you see in the tunnels that there are  
04:52 17 different colors of green and yellow on the document?  
04:52 18 You see that on the tunnels?

04:52 19 A. Yes.

04:52 20 Q. Please understand what those colors represent  
04:52 21 with respect to this document.

04:52 22 MR. ROSENTHAL: Objection, Your Honor.  
04:52 23 That's outside the scope of his report.

04:52 24 THE COURT: Mr. Waldrop, he can discuss  
04:52 25 what is shown on that page.

04:52 1 MR. WALDROP: Okay. Yes. So go ahead.

04:53 2 THE COURT: I mean, he can articulate  
04:53 3 what's written on that page.

04:53 4 MR. WALDROP: Exactly.

04:53 5 THE COURT: Beyond that -- and if that's  
04:53 6 what you're asking him to do, then I'll overrule the  
04:53 7 objection.

04:53 8 MR. WALDROP: Okay. Thank you, Your  
04:53 9 Honor. And that's what I'm asking, Your Honor.

04:53 10 THE COURT: Okay.

04:53 11 BY MR. WALDROP:

04:53 12 Q. You'll see here with respect to the paths that  
04:53 13 are here. And I'll start on the left, Dr. McClellan.  
04:53 14 If you'll see here on the far left, between Hub 1 and  
04:53 15 Hub 2, or the top hub and the bottom hub, you'll see  
04:53 16 the three -- the three lines.

04:53 17 Are those the tunnels, Dr. McClellan?

04:53 18 A. Yeah. Those are the tunnels.

04:53 19 Q. And is that the paths that's discussed between  
04:53 20 the hubs?

04:53 21 A. Yeah. Those may be multiple paths or multiple  
04:53 22 tunnels that are between the two hubs. And the  
04:53 23 different colors in there indicate something that's  
04:53 24 different about the traffic --

04:53 25 MR. ROSENTHAL: Objection. That's --

04:53 1 that's outside the scope of his report, that last part  
04:53 2 of his answer.

04:53 3 MR. WALDROP: I'll re-ask the question,  
04:53 4 Your Honor.

04:53 5 THE COURT: Okay. The jury will  
04:53 6 disregard the answer that he just gave.

04:53 7 BY MR. WALDROP:

04:53 8 Q. So only keeping it to the language,  
04:54 9 Dr. McClellan, that you see here on the figure. And  
04:54 10 the figure, I'll start marking it. So if you just tell  
04:54 11 me as -- only using the language here, is this the hub  
04:54 12 here, Dr. McClellan, that's talked about on the far  
04:54 13 right here?

04:54 14 A. Yeah. That says it's a hub.

04:54 15 Q. And this says it's configured with VMware  
04:54 16 SD-WAN orchestrator, right?

04:54 17 A. Yes. The orchestrator is the blue thing up in  
04:54 18 the top.

04:54 19 Q. And you said notifies all SD-WAN Edges about  
04:54 20 hubs.

04:54 21 Do you see that?

04:54 22 A. Right.

04:54 23 Q. And you'll see here in the middle,  
04:54 24 Dr. McClellan, that it says the VMware SD-WAN Edges  
04:54 25 build static multipath tunnels to hubs?

04:54 1 A. That's right.

04:54 2 Q. And these are the paths here -- the tunnels?

04:54 3 I'm sorry.

04:54 4 A. Right.

04:54 5 Q. And you also see on the third where it says  
04:54 6 VMware SD-WAN Edges still use VMware SD-WAN gateway to  
04:54 7 distribute route?

04:54 8 A. Right.

04:54 9 Q. And is -- where is the route?

04:54 10 A. That's not really shown on here.

04:54 11 Q. Now, it also says EZE ETE traffic is first  
04:55 12 sent to the hub based on the routing table.

04:55 13 Do you see that, Dr. McClellan?

04:55 14 A. Yes.

04:55 15 Q. What does that mean?

04:55 16 A. That part really isn't germane to the picture  
04:55 17 either. I think the second -- the second --

04:55 18 Q. This sentence here?

04:55 19 A. Yeah.

04:55 20 Q. And I'll read it --

04:55 21 A. It says the Edges establish direct tunnels.

04:55 22 Q. So it says the dynamic ETE, and that's, I  
04:55 23 guess, edge to edge is configured VMware SD-WAN  
04:55 24 establish direct tunnels.

04:55 25 Do you see that?

04:55 1 A. Right.

04:55 2 Q. Is that it? Okay. Thank you, Dr. McClellan.

04:55 3 And it says here edge to edge -- here edge to

04:55 4 edge VPN with tunnel.

04:55 5 Do you see that, Dr. McClellan?

04:55 6 A. Yeah. This is talking about a specific use

04:55 7 case where you have a VPN with hubs.

04:55 8 Q. All right. Thank you, Dr. McClellan.

04:55 9 So now, Dr. McClellan, I want to return to --

04:55 10 and this is a very important question because I want to

04:55 11 make sure that this -- the jury understands exactly

04:55 12 what they're seeing. Is this one of the accused

04:55 13 products that is accused of infringement of Claim 13 of

04:56 14 the -- hold on. Let me back up.

04:56 15 Is this a VeloCloud product?

04:56 16 A. Yes.

04:56 17 Q. Great. Thank you.

04:56 18 MR. WALDROP: I'd like to return back, if

04:56 19 I can, to the -- thank you. Thank you.

04:56 20 So I just press the button?

04:56 21 (Off-the-record discussion.)

04:56 22 BY MR. WALDROP:

04:56 23 Q. So we'll go to Slide 49. Now -- and this is

04:56 24 an important question, Dr. McClellan. This is the one

04:56 25 that we started out with respect to this case. Does

04:56 1 each claim element in Claim 13, is it present in the  
04:56 2 VMware Edge and Gateway DMPO products, what I've been  
04:56 3 calling VeloCloud?

04:56 4 A. I don't have a display.

04:56 5 MR. WALDROP: Can they see it now?

04:56 6 You have it now?

04:57 7 Okay. Good. We're back on now.

8 BY MR. WALDROP:

04:57 9 Q. Okay. So I'll restate the question. So each  
04:57 10 claim element of Claim 13 is present in the VMware  
04:57 11 Edge, what I call VeloCloud products, Dr. McClellan?

04:57 12 A. Yes.

04:57 13 Q. Now, I want to talk to you about the process  
04:57 14 by which you went through to arrive at this opinion,  
04:57 15 Dr. McClellan.

04:57 16 What was the process by which you went through  
04:57 17 to arrive at this analysis, Dr. McClellan?

04:57 18 A. Well, this slide shows three steps that are  
04:57 19 kind of common to this kind of process. The Court's  
04:57 20 claim construction, which we've had some discussion  
04:57 21 about that already today. There's the patent and the  
04:57 22 claims of the patent and then there's the product. And  
04:57 23 you have to compare the patent claims to the product.

04:57 24 Q. And then what did you -- what else did you do  
04:57 25 to -- in terms of reviewing materials?



04:57 1 A. Well, there are a lot of other materials that  
04:57 2 are provided in cases like this, where in addition to  
04:58 3 the claim construction order, the claims and the  
04:58 4 comparison to the product, there's the deposition  
04:58 5 testimony. We've already seen some deposition  
04:58 6 testimony here. And then there's discovery responses  
04:58 7 which are generally the documents that we've been  
04:58 8 showing pieces of were often discovery responses  
04:58 9 documents. And then also there's a source code that's  
04:58 10 provided.

04:58 11 Q. Now, Dr. McClellan, you relied on a number of  
04:58 12 documents that you reviewed in arriving at your  
04:58 13 opinion, right, Dr. McClellan?

04:58 14 A. Yes.

04:58 15 Q. And is that shown on Slide 52?

04:58 16 A. That's the list.

04:58 17 Q. And I know this may take a while, but it may  
04:58 18 save us some time later on. Could you read that into  
04:58 19 the record?

04:58 20 And I know this is laborious, but this will be  
04:58 21 helpful to you. If you could just read off the  
04:58 22 materials that you relied upon in terms of reaching  
04:58 23 your infringement analysis, Dr. McClellan.

04:58 24 A. Well, there's the Court's claim construction  
04:58 25 order. There's the '133 patent itself. There's

04:58 1 various deposition testimonies. There's VMware's  
04:58 2 discovery responses; other VMware documents; VMware  
04:59 3 source code; VMware expert reports. And then these  
04:59 4 other documents that we've kind of taken pieces out of:  
04:59 5 PTX-5, 7, 200, 125, 211, 126, 204, 82, 209, 124, 79,  
04:59 6 625, 197, 114, 613, 507, 85, 213, 333, 311, 336, 313,  
04:59 7 and 607.

04:59 8 And I think that's all of them. But I can't  
04:59 9 see the very bottom of the screen, again, because of  
04:59 10 the menu. If there's any ones that are under that  
04:59 11 No. 15, then I can't see them.

04:59 12 Q. No. I appreciate it, Dr. McClellan.

04:59 13 And you can't see -- what are you -- what's  
04:59 14 the last PTX you can see, Dr. McClellan?

04:59 15 A. 82 and 607.

04:59 16 Q. That's -- and can you see what's on the right  
05:00 17 side?

05:00 18 A. According to that monitor over there, that's  
05:00 19 the last ones.

05:00 20 Q. Okay.

05:00 21 A. I'm just concerned because there's this  
05:00 22 annotation menu that shows up on the bottom of the  
05:00 23 screen that I can't get rid of.

05:00 24 Q. We'll deal with PTX-209, 124, 79, PTX-625,  
05:00 25 which is showing up on my version, if they can see it.

05:00 1 Can y'all see it? Can the jury see it?

05:00 2 A. Yeah, I did -- I got all those.

05:00 3 Q. Okay. Good. So if you got all those, then  
05:00 4 we're good, Dr. McClellan.

05:00 5 So, Dr. McClellan, you also heard -- you're  
05:00 6 familiar with the term "person of ordinary skill in the  
05:00 7 art"?

05:00 8 A. Yes.

05:00 9 Q. And please explain to the jury what that means  
05:00 10 in the context of -- first what it means, and then  
05:00 11 what's the context in terms of your testimony.

05:00 12 A. So a person of ordinary skill in the art is  
05:00 13 somebody who understands -- who can understand what's  
05:00 14 going on with the technology and with the patent. And  
05:00 15 can analyze it effectively.

05:00 16 In this case I think the joint determination  
05:00 17 of a person of ordinary skill in the art is somebody  
05:00 18 with a bachelor's degree in a technical field like  
05:01 19 computer science, computer engineering, electrical  
05:01 20 engineering and so on. And a couple of years of work  
05:01 21 experience where some networking experience,  
05:01 22 particularly network design analysis, load-balancing  
05:01 23 and optimization, that just seems appropriate for the  
05:01 24 stuff that we've been discussing, right?

05:01 25 So that's a person of ordinary skill.

05:01 1 Q. Do you meet or exceed this definition of  
05:01 2 person of ordinary skill in the art?

05:01 3 A. Yes.

05:01 4 Q. And that's kind of like just somebody who  
05:01 5 knows that invention. He understands it, right?

05:01 6 A. Well, I mean, you wouldn't want to subject  
05:01 7 somebody who didn't have these -- some concept of this,  
05:01 8 to this technology.

05:01 9 Q. Now --

05:01 10 A. It would be awful.

05:01 11 Q. Now, you had mentioned earlier that the claim  
05:01 12 terms in the '133 patent, as stated by Judge Albright,  
05:01 13 you had used some of those to interpret some of those,  
05:01 14 right?

05:01 15 A. Yes.

05:01 16 Q. Please explain what you mean by that.

05:01 17 A. Is there another slide for that?

05:01 18 Q. Slide 55. Slide 55.

05:01 19 MR. ROSENTHAL: Your Honor, I object.

05:02 20 Can we take it down, please? This is not  
05:02 21 from his report.

05:02 22 MR. WALDROP: So this may be the point in  
05:02 23 which we make a proffer, Your Honor.

05:02 24 THE COURT: Well, now's not the time to  
05:02 25 make a proffer.

05:02 1 MR. WALDROP: Okay.

05:02 2 MR. ROSENTHAL: And it's the right  
05:02 3 column, Your Honor, that we have a problem with.

05:03 4 (Conference between counsel.)

05:03 5 BY MR. WALDROP:

05:03 6 Q. So we'll come back to that, Dr. McClellan.

05:03 7 So, Dr. McClellan, we'll now move to Slide 56.

05:03 8 Dr. McClellan, is this Claim 13 of the '133  
05:03 9 patent?

05:03 10 A. Yes.

05:03 11 Q. And is this the patent that's being  
05:03 12 asserted -- is this a claim term -- this is the claim  
05:03 13 being asserted in this case?

05:03 14 A. Yes.

05:03 15 Q. And, Dr. McClellan, before we move on, in  
05:03 16 terms of your infringement analysis, did you apply the  
05:03 17 Court's claim construction of plain and ordinary  
05:03 18 meaning with respect to the terms in this case?

05:03 19 A. Yes.

05:03 20 Q. And I'm going to read them into the record.  
05:03 21 The claim term is whether a congestion -- well, we'll  
05:03 22 stop there.

05:04 23 There are three claim terms here for the '133  
05:04 24 patent, right?

05:04 25 And whether a congestion -- one of the terms

05:04 1 is "whether a congestion condition exists for the  
05:04 2 egress node."

05:04 3 Are you familiar with that term, Doctor?

05:04 4 A. Yes.

05:04 5 Q. And the Court's claim construction was plain  
05:04 6 and ordinary meaning?

05:04 7 A. Yes.

05:04 8 Q. And did you apply that plain and ordinary  
05:04 9 meaning?

05:04 10 A. Yes.

05:04 11 Q. The second term, and we'll get to it, is  
05:04 12 "processing the packets."

05:04 13 Are you familiar that term of Claim 13,  
05:04 14 Dr. McClellan?

05:04 15 A. Yes.

05:04 16 Q. And did you apply the Court's construction of  
05:04 17 plain and ordinary meaning to that term?

05:04 18 A. Yes.

05:04 19 Q. And the last term, which is longer, but it  
05:04 20 says "such that packets associated with egress nodes  
05:04 21 from which the congestion condition does not exist have  
05:04 22 a different queueing priority within the load-balancing  
05:04 23 network than packets associated with egress nodes to  
05:04 24 which the congestions node exists."

05:04 25 Are you familiar with that term,

05:04 1 Dr. McClellan?

05:04 2 A. Yes.

05:04 3 Q. Did you apply the Court's claim construction  
05:04 4 of plain and ordinary meaning to that term?

05:04 5 A. Yes.

05:04 6 Q. Now, in front of us are all three of these  
05:04 7 terms that I just discussed found in this Claim 13?

05:04 8 A. I believe so.

05:04 9 Q. And are we going to address each of those in  
05:05 10 detail as we go through?

05:05 11 A. Yeah. We're going to address each claim term  
05:05 12 individually.

05:05 13 Q. Okay. So we're going to go on a little ride  
05:05 14 that's going to repeat -- that's going to repeat some  
05:05 15 of the evidence that you've already discussed,  
05:05 16 Dr. McClellan. But we have to do this to satisfy our  
05:05 17 burden of showing infringement in this case.

05:05 18 You understand that, right, Dr. McClellan?

05:05 19 A. Yes.

05:05 20 Q. So now, what we're going to do is we're going  
05:05 21 to split this up into elements.

05:05 22 MR. WALDROP: And if we go to the next  
05:05 23 slide.

24 BY MR. WALDROP:

05:05 25 Q. If you could tell the jury what we're about to

05:05 1 do in terms of your infringement analysis.

05:05 2 A. So on the left-hand side is just the elements  
05:05 3 of the claim broken out into sort of a chart format.  
05:05 4 And on the right-hand side is another column, and we're  
05:05 5 going to go row by row through this chart and we're  
05:05 6 going to show the first row of the chart and we're  
05:05 7 going to show the evidence that's associated with the  
05:05 8 first row of the chart.

05:05 9 And when we finish showing that evidence, then  
05:05 10 we will say that infringement has been shown for that  
05:06 11 claim term. And then we'll put a little checkmark on  
05:06 12 the right-hand side so you can kind of follow along.

05:06 13 Q. And so as we go through, we're just going to  
05:06 14 check it off and we're going to get to the end --

05:06 15 A. Check it off and get to the end.

05:06 16 Q. Okay. Let's go.

05:06 17 MR. WALDROP: So let's move to the next  
05:06 18 slide, the first element, which is Slide 58.

19 BY MR. WALDROP:

05:06 20 Q. So this is the first element of the claim.  
05:06 21 And I'll read it into the record. It's: An apparatus  
05:06 22 for routing traffic in a load-balancing network  
05:06 23 comprising a plurality of nodes, comprising...

05:06 24 Do you see that, Dr. McClellan?

05:06 25 A. Yes.



05:06 1 Q. Now, it has this term "comprising."

05:06 2 Do you see that there, Dr. McClellan, with the  
05:06 3 green box on it?

05:06 4 A. Yes.

05:06 5 Q. Can you explain to the jury in the next slide,  
05:06 6 what does that mean?

05:06 7 A. Comprising means that it has at least that.  
05:06 8 So the example here is that Old MacDonald has a farm  
05:06 9 and he has a patent on his farm. And on his farm, he's  
05:06 10 got a pig, a cow and a duck.

05:06 11 And somebody else has a farm and they have a  
05:07 12 pig, a cow and a duck and they add a horse. But the  
05:07 13 fact that they had a pig and a cow and a duck means  
05:07 14 that they infringed Old MacDonald.

05:07 15 Q. And why is the "comprising" term in Claim 13  
05:07 16 important to this case?

05:07 17 A. Because they have to have at least that. They  
05:07 18 can have more. They can have other things, but they  
05:07 19 have to have at least that.

05:07 20 Q. So, Dr. McClellan, I'd like to show the jury  
05:07 21 where the elements of each claim of Claim 13, so the  
05:07 22 elements of Claim 13, each one where they're present in  
05:07 23 VeloCloud.

05:07 24 Can I do that?

05:07 25 A. Yep.

05:07 1 Q. And do you show us a slide that shows how this  
05:07 2 element is met?

05:07 3 A. Yeah. So this slide -- this slide takes the  
05:07 4 first element of Claim 13 and it looks for an  
05:07 5 apparatus. And the apparatus needs to function in a  
05:07 6 load-balancing network with a plurality of nodes. I  
05:08 7 think we've shown plenty of evidence that the VeloCloud  
05:08 8 devices are an apparatus.

05:08 9 And those apparatus -- those -- I don't even  
05:08 10 know what the plural of apparatus is, but those  
05:08 11 apparatuses are supposed to be deployed in a  
05:08 12 load-balancing network with several nodes.

05:08 13 MR. WALDROP: And can I have PTX-211?  
05:08 14 BY MR. WALDROP:

05:08 15 Q. PTX-211 that we discussed before, which was  
05:08 16 that VeloCloud product. This is the same thing that I  
05:08 17 showed you earlier on the document -- on the camera.  
05:08 18 Yeah.

05:09 19 A. So this is the same as the document from the  
05:09 20 document camera.

05:09 21 Q. And so this is a piece of evidence that you  
05:09 22 relied upon to show that it meets that first element of  
05:09 23 Claim 13?

05:09 24 A. Yes. It implements a load-balancing network  
05:09 25 with a plurality of nodes.

05:09 1 MR. WALDROP: So if we could return back  
05:09 2 to the slide deck of Slide 61.

05:09 3 And so then we'll go to the next slide,  
05:09 4 Slide 62.

5 BY MR. WALDROP:

05:09 6 Q. Can we check that off, Dr. McClellan?

05:09 7 A. Let's check that one off.

05:09 8 Q. So we've showed that we've met the first  
05:09 9 element of Claim 13.

05:09 10 Now we'll go to the second element of Claim  
05:09 11 13.

05:09 12 MR. WALDROP: Slide 63.

13 BY MR. WALDROP:

05:09 14 Q. And I'll read this into the record, which is:  
05:09 15 A processor for -- a processor module for receiving a  
05:09 16 traffic flow comprising a plurality of packets; and...

05:09 17 Do you have evidence showing of how this  
05:09 18 element is met by the VeloCloud product, Dr. McClellan?

05:10 19 A. Yes.

05:10 20 Q. Please describe that to the jury.

05:10 21 A. We showed this picture before --

05:10 22 MR. ROSENTHAL: I'm sorry. I need to  
05:10 23 interrupt again.

05:10 24 I object to the slide. Please take it  
05:10 25 down. This is an opinion that is not in his report

05:10 1 with respect to processor module.

05:10 2 MR. WALDROP: This? Do you want me to  
05:10 3 approach, Your Honor?

05:10 4 THE COURT: Sure.

05:10 5 (Bench conference.)

05:11 6 MR. ROSENTHAL: Which number?

05:11 7 MR. WALDROP: Hold on a second.

05:11 8 So, Your Honor, we have annotated here,  
05:11 9 Your Honor, 129, 130, 132.

05:11 10 THE COURT: I just need a page. 83?

05:11 11 MR. WALDROP: Yes, sir. So I'll get you  
05:11 12 the page, Your Honor. Thank you.

05:11 13 THE COURT: Okay. Now, do you have a  
05:11 14 copy of the slide you want to show?

05:11 15 MR. WALDROP: I didn't bring the slide  
05:11 16 up, Your Honor.

05:11 17 THE COURT: So what is it you want to  
05:11 18 say? What is it you're going to ask him?

05:11 19 MR. WALDROP: Well, this was previously  
05:11 20 shown about whether or not the path is met, Your Honor.  
05:12 21 This is a previous document. This is the same document  
05:12 22 we already showed him. He's showing how that document  
05:12 23 meets the limitation of the claims, Your Honor.

05:12 24 129, 130. 130, you'll see he references  
05:12 25 this document that Mr. -- so 130, you'll see it there.

05:12 1 Paragraph 130, 131. Paragraph 133, Paragraph 135,  
05:12 2 Paragraph 145, Your Honor.

05:12 3 And so you'll see here both sections,  
05:12 4 Your Honor, we're talking about the very document we've  
05:12 5 already shown the witness when we're talking about DMPO  
05:12 6 and how it processes packets.

05:12 7 So he's going back here to talk about  
05:12 8 that language as it relates to the claim element. So  
05:12 9 now we're talking about the claim element. So we don't  
05:12 10 have the same issues, I would think, where we have the  
05:12 11 claim element on the left, figure on the right and he's  
05:12 12 talking about respect to his report.

05:12 13 Those are the pages and the paragraph  
05:12 14 numbers, Your Honor.

05:13 15 MR. ROSENTHAL: My problem, Your Honor,  
05:13 16 is that, first of all, all of these paragraphs are in a  
05:13 17 different claim element. This is the next claim  
05:13 18 element.

05:13 19 There's nothing in this report that ever  
05:13 20 identifies what the claimed processor module is in the  
05:13 21 claim, and it's certainly never puts a box around part  
05:13 22 of that figure. Nothing in the report says that, and  
05:13 23 that's the problem.

05:13 24 MR. WALDROP: Do we -- it's there, Your  
05:13 25 Honor. Do we need to take a break, Your Honor?

05:13 1 Because, Your Honor, this is -- Your Honor, it's like  
05:13 2 we're having an argument when we've already --

05:13 3 THE COURT: Let me ask you this,  
05:13 4 Mr. Rosenthal. Is this your primary noninfringement  
05:13 5 argument?

05:13 6 MR. ROSENTHAL: Well, this is one of  
05:13 7 them. The problem is that his report misses three or  
05:13 8 four elements, just doesn't address them, and this is  
05:13 9 one of them.

05:13 10 So it's one of the things that I will be  
05:13 11 focusing on in my motion.

05:13 12 THE COURT: Why don't I let the jury go  
05:13 13 and I'll take these slides -- are there, I guess, three  
05:14 14 or four?

05:14 15 MR. ROSENTHAL: There's others. Yeah.  
05:14 16 What I would --

05:14 17 THE COURT: What you can do is, for  
05:14 18 example here, the claim requirement is a process module  
05:14 19 for receiving a traffic flow -- well, what you're going  
05:14 20 to have to show me, Mr. Waldrop, is where he, you know,  
05:14 21 what -- where he says what you want him to say in the  
05:14 22 report.

05:14 23 If you can do that, then you can use the  
05:14 24 slides.

05:14 25 MR. WALDROP: Okay.

05:14 1 THE COURT: We'll do that outside the  
05:14 2 jury's presence.

05:14 3 MR. WALDROP: Thank you very much, Your  
05:14 4 Honor.

05:14 5 (Bench conference concludes.)

05:14 6 THE COURT: Ladies and gentlemen of the  
05:14 7 jury, we've decided that you all might have a better  
05:14 8 way of spending your time not being here than being  
05:14 9 here and watching us chat, so -- but the chatting is  
05:14 10 necessary.

05:14 11 Like I said, if it weren't for the  
05:14 12 chatting, then I wouldn't need to be here. We wouldn't  
05:14 13 want that. So we are going to recess for the evening.

05:15 14 If you all would be back by -- can I have  
05:15 15 the lawyers back up for just one second?

05:15 16 (Bench conference.)

05:15 17 THE COURT: I leave it up to you all.  
05:15 18 I've -- I can invite them and they can come here for  
05:15 19 the sentencing and attend it. And then we can get  
05:15 20 started right away. But I don't -- you know, if you  
05:15 21 all don't want them to attend the sentencing, that's  
05:15 22 y'all's call. It's not very -- I don't see how it  
05:15 23 would impact your case, but it's -- y'all are the trial  
05:15 24 lawyers, not me.

05:15 25 MR. ROSENTHAL: I don't have a problem

05:15 1 with that. As long as there's a sort of idea of when  
05:15 2 we will start, that's all.

05:15 3 THE COURT: Well, I only -- I have -- if  
05:15 4 I start at --

05:15 5 DEPUTY CLERK: 11 total.

05:15 6 THE COURT: Yeah. And I start at 9:00?  
7 I start at 9:00 tomorrow?

8 DEPUTY CLERK: Yes, sir.

05:16 9 THE COURT: I'll be done, I think, by  
05:16 10 10:30.

05:16 11 MR. ROSENTHAL: Okay.

05:16 12 THE COURT: 10:30. 11:00 probably be the  
05:16 13 latest. And if they're here and we get it going. And  
05:16 14 if not, I'll tell them to be here at 10:30. I'll tell  
05:16 15 them to come at 9:00 and they can sit and watch or they  
05:16 16 can be here at 10:30 and we'll start as soon as I'm  
05:16 17 done.

05:16 18 Work for you?

05:16 19 MR. WALDROP: Yes, sir.

05:16 20 (End of bench conference.)

05:16 21 THE COURT: So ladies and gentlemen of  
05:16 22 the jury, as I told you earlier, tomorrow I'll be  
05:16 23 sentencing people. You may find that very interesting.  
05:16 24 I have had jurors tell me it was very interesting. But  
05:16 25 you might not want to attend.



05:16 1 So I will begin tomorrow morning at 9:00  
05:16 2 sentencing people. If you'd like to be here, you're  
05:16 3 welcome to come and sit in the back of the courtroom  
05:16 4 and watch and see how that side of -- I think you'd  
05:16 5 find it very fascinating. When you watch news and hear  
05:16 6 everything that's going on in the world, you would see  
05:16 7 it from a different perspective.

05:17 8 But if you don't want to do that, that's  
05:17 9 absolutely fine. It's your choice. But I'd ask you to  
05:17 10 be here at 10:30. Hopefully I'll be wrapped up with my  
05:17 11 sentencings by then. And either at 10:30 or as soon as  
05:17 12 I finish with the sentencings, we'll start with the  
05:17 13 trial.

05:17 14 So those are your choices. Come at 9:00  
05:17 15 or any time between 9:00 and 10:30 and watch the  
05:17 16 sentencings. Or be here at 10:30 and one of these  
05:17 17 gentlemen will take you back to the jury room. And  
05:17 18 you're welcome to do either one.

05:17 19 You can't discuss the case amongst  
05:17 20 yourselves. You can't do any research outside of the  
05:17 21 court. And you can't post anything on social media  
05:17 22 about the case.

05:17 23 Other than that, I hope you have a  
05:17 24 wonderful evening with your family. And we will see  
05:17 25 you tomorrow morning no later than 10:30.

05:17 1 THE BAILIFF: All rise.

05:17 2 (Jury exited the courtroom.)

05:18 3 THE COURT: You may be seated.

05:18 4 You may step down.

05:18 5 For what it's worth, and I love having  
05:18 6 everyone who's here, but if there are those of you who  
05:18 7 don't need to be here because you have things to do  
05:18 8 tomorrow, you certainly don't need to -- you are -- the  
05:18 9 only people that need to stay here are the ones who  
05:18 10 want to stay here while we work this out.

05:18 11 I know the rest of you all have things to  
05:18 12 do in trial. And you're certainly welcome to go do  
05:18 13 those. You're certainly welcome to stay.

05:18 14 So Mr. Waldrop, if you would put that --  
05:18 15 excuse me -- slide back up that you were dealing with  
05:19 16 which is Slide 64 of your demonstratives.

05:19 17 MR. WALDROP: Yes, Your Honor.

05:19 18 THE COURT: Okay. Now, what I need for  
05:19 19 you to do -- it's pretty clear that what you have is a  
05:19 20 page from the patent. You've blown up traffic flow  
05:19 21 sorted into traffic classes.

05:19 22 MR. WALDROP: Yes, sir.

05:19 23 THE COURT: And you've blown up claim  
05:19 24 requirement. So all those things by themselves are not  
05:19 25 objectionable. Because I can find them in the patent.

05:19 1 MR. WALDROP: Yes, Your Honor.

05:19 2 THE COURT: Now, what I think

05:19 3 Mr. Rosenthal cares about is what you intend to have

05:19 4 your witness say that this -- you -- the title is

05:19 5 VeloCloud infringes Element 2. Which tells me he's

05:19 6 going to explain how the traffic flow sorted into

05:19 7 traffic classes in the manner that is shown there --

05:19 8 actually I guess -- let me ask you this: Is what's at

05:20 9 the top, is that from something that was produced by

05:20 10 defendant? Or is that --

05:20 11 MR. WALDROP: Yes, Your Honor. Yes, Your  
05:20 12 Honor.

05:20 13 THE COURT: Okay. Okay. So let me -- so

05:20 14 I figured -- okay. So what you want your expert to say

05:20 15 is he has blown up the spec. He has something from

05:20 16 Dell there and he wants to be able to say this is what

05:20 17 the claim requires and this is how Dell meets it by

05:20 18 showing the traffic flow.

05:20 19 MR. WALDROP: Yes, sir. VMware. Yes,  
05:20 20 sir.

05:20 21 THE COURT: Now, where in his report does  
05:20 22 he tell Dell what he intends to tell the jury tomorrow?

05:20 23 MR. WALDROP: So on Slide 64, Your Honor,  
05:20 24 we just talked about that. We have Paragraphs 129 --

05:20 25 THE COURT: Okay. Let me get there.

05:20 1 MR. WALDROP: There are multiple  
05:20 2 paragraphs, Your Honor.

05:20 3 THE COURT: Okay. Let me get to 129.  
05:21 4 Okay. 129 is just him quoting from Mr. Craig Connors.  
05:21 5 And obviously anything he wants to tell the jury that  
05:21 6 Mr. Connors said, he can do.

05:21 7 What's in 130 that you care about?

05:21 8 MR. WALDROP: Hold on one second. Let me  
05:21 9 see, Your Honor. I thought -- let me just be -- so  
05:21 10 because we're doing it -- we're doing it  
05:21 11 element-by-element, if you want to do that, Your Honor,  
05:21 12 because of where we are, the first element that we  
05:21 13 mentioned this in starts with 100 which references the  
05:21 14 document. So 100, 101 and 102.

05:21 15 THE COURT: Okay. Hold on.

05:21 16 MR. WALDROP: So just because I want to  
05:22 17 make sure we're talking with the first element. We're  
05:22 18 only with the first element, "a processor for..."

05:22 19 MR. STERN: Your Honor, if I may, Your  
05:22 20 Honor, explain this a little bit more --

21 (Clarification by Reporter.)

05:22 22 MR. STERN: Mr. Stern for plaintiff  
05:22 23 Brazos, Your Honor.

05:22 24 The elements are very intertwined. There  
05:22 25 are multiple references to this specific picture in

05:22 1 almost each of the elements here, with an explanation  
05:22 2 of how the packets move through. So there's a picture  
05:22 3 of the larger -- of the larger -- of the larger flow,  
05:22 4 right? With an explanation of what's going on in that  
05:22 5 larger flow.

05:22 6 THE COURT: Well, is the good doctor  
05:22 7 going to say anything about how the flow goes through,  
05:22 8 other than what -- it appears to me, quick scan, that  
05:22 9 what he's done is he's quoted from witnesses or he's  
05:23 10 quoted from documents. And he's saying this is how  
05:23 11 they say it works.

05:23 12 And I don't think there's an objection --  
05:23 13 my guess is there's not an objection to that.

05:23 14 MR. ROSENTHAL: No objection to that,  
05:23 15 Your Honor.

05:23 16 THE COURT: And if there were, I would  
05:23 17 overrule it. Because it's in the report.

05:23 18 What I'm looking for is that's probably  
05:23 19 not going to get you all where you want with this jury.  
05:23 20 What I'm anticipating is that he is at some point going  
05:23 21 to say, look at what's on the left. Now, look at -- it  
05:23 22 says traffic flow sorted into traffic classes. And he  
05:23 23 has that. And that meets the claim requirement of a  
05:23 24 processor module for receiving a traffic flow  
05:23 25 comprising a plurality of packets.

05:23 1 Now, where does he explain, in his own  
05:23 2 opinion, why that happens?

05:23 3 MR. WALDROP: In my opinion -- in  
05:23 4 Paragraph 109 he says, in my opinion, the accused  
05:23 5 products comprise -- comprises of a processor module  
05:23 6 for receiving a traffic flow comprising a plurality of  
05:24 7 packets.

05:24 8 And he also cites to an infringement  
05:24 9 chart, Your Honor, and --

05:24 10 THE COURT: Well, no. That's just --  
05:24 11 he's just summarizing there. He's -- at 109 he's just  
05:24 12 summarizing, in my opinion, the accused product -- I  
05:24 13 could -- here's the standard you have to meet. You  
05:24 14 have -- he has to say something that I couldn't have  
05:24 15 written.

05:24 16 I could have written, in my opinion, the  
05:24 17 accused product comprises -- comprises of a processor  
05:24 18 module for receiving a traffic flow comprising a  
05:24 19 plurality... because that's just reciting what the  
05:24 20 claim element says. So I could have done that.

05:24 21 I need to see where he explains why --  
05:24 22 where he explains why 109 is correct. Where is his  
05:24 23 opinion that says I just told you in 109 what my -- a  
05:24 24 summary of my opinion. And here's where I explain why  
05:24 25 that's right.

05:24 1 MR. WALDROP: He goes through -- he goes  
05:24 2 through, sir, and explains where -- and connects the  
05:25 3 documents with the claim language of nodes throughout  
05:25 4 the entire report, Your Honor.

05:25 5 For example, I'll give you an example --

05:25 6 THE COURT: Well, no. He skips right --  
05:25 7 from 109, he skips right to any claim element not  
05:25 8 literally present is found by a Doctrine of  
05:25 9 Equivalents.

05:25 10 And he -- what I need to know -- and then  
05:25 11 he has a bunch of products. I get that too. And then  
05:25 12 he goes on 113, 114, he summarizes what people say.

05:25 13 I'm going to try one more time. Where  
05:25 14 does he explain why, in his opinion, the fact that  
05:25 15 traffic flow is sorted into traffic classes, in his  
05:25 16 opinion, in the Dell products meets the claim  
05:25 17 requirement of it having a processor module for  
05:26 18 receiving a traffic flow comprising.

05:26 19 Or are you just -- is he simply just  
05:26 20 going to say it has this, therefore, that's the extent,  
05:26 21 in my opinion? My opinion is summarized in -- it has a  
05:26 22 traffic flow sorted in traffic classes and that meets  
05:26 23 the claim requirement. And that is all he's going to  
05:26 24 say?

05:26 25 MR. WALDROP: Your Honor, in Paragraph --

05:26 1 so, Your Honor, he does connect that. On Paragraph 115  
05:26 2 he talks about how it implements two sets of  
05:26 3 schedulers, right? He says an example of VMware  
05:26 4 documents explains the network and link scheduler is  
05:26 5 functions of using QRS to adjust packet scheduling and  
05:26 6 manage traffic and congestion for condition of  
05:26 7 subscription as discussed. VeloCloud implements two  
05:26 8 sets of schedulers. Networks scheduling that  
05:26 9 implements, among other things, QRS hierarchy, e.g.,  
05:26 10 priority queueing into link scheduler, among other  
05:26 11 things, identifies and addresses, among other things,  
05:26 12 over-subscription of local and remote --

05:26 13 THE COURT: And then there's -- where's  
05:26 14 the paragraph that says, for example, based on what I  
05:27 15 wrote in 115, my opinion is it infringes and here's  
05:27 16 why?

05:27 17 MR. WALDROP: The opening paragraph, Your  
05:27 18 Honor, 109. He says --

05:27 19 THE COURT: Well, no, no. 109 doesn't  
05:27 20 get it. 109 just says -- just says: In my opinion,  
05:27 21 the accused products comprise what is in the claim  
05:27 22 requirement.

05:27 23 That doesn't explain why what is in  
05:27 24 Paragraph 115 shows that there's infringement, because  
05:27 25 he has to do that so that the defendant, if they put on



05:27 1 a noninfringement case, can say, you heard this expert  
05:27 2 say X and here's why he's wrong.

05:27 3 All he's saying right now is, it has this  
05:27 4 stuff and, therefore, I think it infringes.

05:27 5 That's not an opinion. That's not -- it  
05:27 6 doesn't explain why it meets the claim element. It --  
05:28 7 you know, it has -- it's not -- and I'm not good at  
05:28 8 analogies. There's an electric car and it has the  
05:28 9 battery and the battery saves power, which is what the  
05:28 10 claim element requires.

05:28 11 How does it say the -- how does it do it?  
05:28 12 How does it infringe? How does it infringe?

05:28 13 MR. WALDROP: Your Honor, Your Honor,  
05:28 14 like I said before, Your Honor, this -- we've explained  
05:28 15 this in multiple briefs, Your Honor. I'm shocked that  
05:28 16 we're here -- actually shocked you're here, Your Honor,  
05:28 17 to be having this discussion with you since --

05:28 18 THE COURT: Well, so am I, but we're --  
05:28 19 probably for different reasons.

05:28 20 So I don't think this -- I don't think  
05:28 21 this is that challenging. And, again, when I did --  
05:28 22 actually, they -- some people let me put on technical  
05:28 23 experts. They probably hadn't met me.

05:28 24 But when I was doing the damages, I --  
05:28 25 and I had my expert say why it was X, that was

05:29 1 explained in his report why it was X. The jury didn't  
05:29 2 hear anything really that wasn't in the report.

05:29 3 That's the way it works, is you put it in  
05:29 4 a report. They get to ask you at the depositions to  
05:29 5 explain what's in the report, and then they have  
05:29 6 someone really smart come in and say, no. That's  
05:29 7 wrong. And the jury hears both of them, and they say  
05:29 8 one or the other is right.

05:29 9 But he only -- here's what we're going to  
05:29 10 do. Because I -- you know, we can't go on forever like  
05:29 11 this.

05:29 12 MR. WALDROP: Yep.

05:29 13 THE COURT: Here's the standard. And I'm  
05:29 14 going to say this one more time.

05:29 15 MR. WALDROP: Yes, sir.

05:29 16 THE COURT: As you're doing your outline  
05:29 17 for your expert --

05:29 18 MR. WALDROP: Yes, sir.

05:29 19 THE COURT: -- when you ask him a  
05:29 20 question, you need to go backwards and you need to say  
05:29 21 what -- the answer needs to be in the report or close  
05:29 22 enough to it that you'll convince me that it says that.  
05:30 23 It doesn't need to be word for word, but -- it would be  
05:30 24 easier for me if it were, but it needs to be in here.

05:30 25 And then ask him: How do I ask this

05:30 1 question so I get this answer?

05:30 2 Because that way tomorrow if there is an  
05:30 3 objection, you can say, Judge, it's in Paragraph 111.  
05:30 4 And it's right there. That's the answer you're going  
05:30 5 to hear, is what's in the report in the same way it's  
05:30 6 in the report.

05:30 7 However -- whatever you need to do to  
05:30 8 accomplish that, that's what it's going to take for  
05:30 9 this expert -- and we're not going to keep going  
05:30 10 through the exercise that we've been doing coming to  
05:30 11 the bench.

05:30 12 I'm just going to say to you,  
05:30 13 Mr. Waldrop, tell me where in the report it is. And  
05:30 14 I'm going to have it up here, and I'm going to expect  
05:30 15 what he says to be in the report in the format it's in  
05:30 16 the report.

05:30 17 MR. WALDROP: Thank you, Your Honor.  
05:30 18 Yes, Your Honor. Thank you very much.

05:30 19 THE COURT: Hopefully that helps.

05:31 20 MR. WALDROP: That is very helpful, Your  
05:31 21 Honor. Thank you very much.

05:31 22 THE COURT: So anything else we need to  
05:31 23 take up tonight?

05:31 24 MR. ROSENTHAL: Not for Defendants.

05:31 25 THE COURT: Let me ask you this,

05:31 1 Mr. Waldrop. So when we finish with your expert, and  
05:31 2 that will take awhile with cross, so I'm anticipating  
05:31 3 we won't finish with him in the morning is my guess.

05:31 4 MR. ROSENTHAL: It'll be after lunch.

05:31 5 THE COURT: I'm pretty sure Mr. Rosenthal  
05:31 6 has some time he intends to spend with him.

05:31 7 And so -- but we finish with your expert,  
05:31 8 who comes next?

05:31 9 MR. WALDROP: Our damages expert, Your  
05:31 10 Honor.

05:31 11 THE COURT: Okay. And after the damages  
05:31 12 expert?

05:31 13 MR. WALDROP: We're done for rebuttal.

05:31 14 THE COURT: Okay. I should remember this  
05:31 15 by now. Who's your damages expert?

05:31 16 MR. WALDROP: Roy Weinstein, sir.

05:31 17 THE COURT: Okay. He's here?

18 MR. WALDROP: Yes, sir.

05:31 19 THE COURT: Okay. Very good. And so you  
05:31 20 will be finished tomorrow?

05:31 21 MR. WALDROP: Yes. Yes, Your Honor.

05:31 22 THE COURT: Okay. Now, what -- so that  
05:31 23 means the defendant will be filing motions. You can  
05:31 24 make them orally and then supplement, you know, file  
05:31 25 whatever you need to file.

05:31 1 Who will the defendants' witnesses be  
05:32 2 tomorrow?

05:32 3 MR. ROSENTHAL: Our first witness is  
05:32 4 going to be Kit Colbert, the CTO. So he'll go -- and,  
05:32 5 by the way, we have an agreement with the other side  
05:32 6 that they can ask questions outside the scope of the  
05:32 7 examination and have it as part of their case so they  
05:32 8 don't officially rest until the conclusion.

05:32 9 THE COURT: I got it.

05:32 10 MR. ROSENTHAL: We took him out of turn,  
05:32 11 so that he only had to go once.

05:32 12 THE COURT: Thank you for letting me know  
05:32 13 that.

05:32 14 MR. WALDROP: Thank you.

05:32 15 MR. ROSENTHAL: So just so you know. And  
05:32 16 that's the point at which we will make our oral motion,  
05:32 17 is after Mr. Colbert sits down.

05:32 18 THE COURT: And you're good with that,  
05:32 19 Mr. Waldrop?

05:32 20 MR. WALDROP: Yes, Your Honor.

05:32 21 MR. ROSENTHAL: And then thereafter, we  
05:32 22 had a little shakeup because of the removal of a couple  
05:32 23 of patents, so we're just coordinating --

05:32 24 THE COURT: They can put them back in.  
05:32 25 Do you really want those?

05:32 1 MR. ROSENTHAL: Let me think.

05:32 2 (Laughter.)

05:32 3 THE COURT: I don't want to hurt anyone's  
05:32 4 feelings by not getting to be here.

05:32 5 MR. ROSENTHAL: But as a result,  
05:32 6 Mr. Turner, Paul Turner is not going to show up.

05:32 7 But what we would like to do, with the  
05:32 8 Court's indulgence, is Mr. Connors, who I mentioned was  
05:32 9 on this sort of last trip with his friend, he has made  
05:32 10 himself available on Thursday to do a Zoom testimony if  
05:33 11 that works for the Court.

05:33 12 THE COURT: It works. Well, it does.  
05:33 13 What I would suggest we do is you coordinate through  
05:33 14 Mark. And if you haven't met our technical person, it  
05:33 15 would be a good time to do it. And if you have -- but  
05:33 16 I would make sure that -- he's shaking his head yes.

05:33 17 So just make sure our technical person is  
05:33 18 available then. It'd be best to have him. We've done  
05:33 19 Zoom, and I'm happy to do that.

05:33 20 What I'll do, so you all know, is I will  
05:33 21 instruct the jury -- when you go to introduce him, I  
05:33 22 will instruct the jury that witnesses are -- since  
05:33 23 COVID have been allowed to appear remotely and that  
05:33 24 he'll be sworn in in the same manner as witnesses who  
05:33 25 are present and that he is to receive -- his testimony

05:33 1 is to receive the equal dignity that any person who's  
05:33 2 shown up will get, which means they're free to accept  
05:33 3 it or not accept it or whatever, but it shouldn't  
05:34 4 matter to them that it will be by Zoom.

05:34 5 So I'll give that little instruction.

05:34 6 MR. ROSENTHAL: We appreciate that. And  
05:34 7 after Mr. Connors, who is going to be the first part of  
05:34 8 Thursday, we may play a deposition -- we'll play a  
05:34 9 deposition at some point, a very short one. And then  
05:34 10 we're going to have Dr. Rosing, who's our technical  
05:34 11 expert.

05:34 12 THE COURT: And so we're into Thursday?

05:34 13 MR. ROSENTHAL: We're into late Thursday  
05:34 14 at this time. And then -- and then we're going to have  
05:34 15 Ms. Gonzalez, a short piece of testimony from her about  
05:34 16 damages-related stuff, and then we're going to have  
05:34 17 Ms. -- Dr. Becker, our damages expert.

05:34 18 THE COURT: Sounds to me like we might  
05:34 19 finish on Friday, but I would -- but we won't do  
05:34 20 closing arguments on -- now, if we can get this in,  
05:34 21 we'll do it. Let's plan at some point -- we'll have to  
05:34 22 go over the -- you all have given us your proposed  
05:34 23 charges, correct?

05:34 24 MR. ROSENTHAL: We have, Your Honor. And  
05:34 25 Mr. Shelton and, I believe, Mr. Williams or

05:35 1 Mr. Siegmund have been doing yeoman's work cutting down  
05:35 2 the objections. So we're going to be very narrow.

05:35 3 THE COURT: Well, let me also explain how  
05:35 4 it works at this point. I don't -- if this isn't my  
05:35 5 20th patent trial, it's getting close. If one of you  
05:35 6 wants something and one of you doesn't want something,  
05:35 7 the one who says, "This is the way you've done it in  
05:35 8 all the others" is going to win.

05:35 9 Now -- but there may be something in this  
05:35 10 case that wasn't in those. And that's when you say,  
05:35 11 this is different and this is why it's here.

05:35 12 And so -- so -- but so the way I do my --  
05:35 13 I'm sure your local counsel's told you this. At some  
05:35 14 point we'll take -- I'll take it up. In fact, if we  
05:35 15 really motor through and are in good shape, maybe what  
05:35 16 we'll do Friday instead of bringing the jury in is come  
05:35 17 in and get the jury charge done or have them here for  
05:35 18 an hour and then work on the jury charge or whatever.

05:35 19 But what will happen is it will be  
05:36 20 informal, and anyone can attend but no one has to. And  
05:36 21 I'll go through and let everyone know how I'm going to  
05:36 22 rule on everything. And then when you close your  
05:36 23 case -- when the case is closed, you'll make your  
05:36 24 formal objections on the record to preserve them.

05:36 25 It takes me an hour to read the jury



05:36 1 charge. So whatever you're thinking about when you're  
05:36 2 going to get to closing arguments, you have to factor  
05:36 3 in it will take me an hour to get that done. So  
05:36 4 there's no way around that.

05:36 5 MR. ROSENTHAL: Very helpful. Thank you.

05:36 6 THE COURT: Is there anything else we  
05:36 7 need to take up?

05:36 8 MR. WALDROP: No. Thank you for your  
05:36 9 time, Your Honor. We appreciate you.

05:36 10 THE COURT: None of you all need to be  
05:36 11 here before 10:30 tomorrow. I'll be otherwise  
05:36 12 occupied.

05:36 13 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
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5 I, Kristie M. Davis, Official Court  
6 Reporter for the United States District Court, Western  
7 District of Texas, do certify that the foregoing is a  
8 correct transcript from the record of proceedings in  
9 the above-entitled matter.

10 I certify that the transcript fees and  
11 format comply with those prescribed by the Court and  
12 Judicial Conference of the United States.

13 Certified to by me this 26th day of  
14 February 2023.

15  
16 /s/ Kristie M. Davis  
KRISTIE M. DAVIS  
Official Court Reporter  
800 Franklin Avenue  
Waco, Texas 76701  
18 (254) 340-6114  
kmdaviscsr@yahoo.com  
19  
20  
21  
22  
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24  
25